

No. 14-10483-AA

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

**GARY VASILOFF,
Petitioner-Appellant,**

v.

**UNITED STATES OF AMERICA,
*Respondent-Appellee.***

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION
Nos. 4:07-cr-00337-VEH-SGC; 4:10-cv-08001-VEH-SGC**

APPENDIX

**JOYCE WHITE VANCE
*United States Attorney
Northern District of Alabama***

**MICHAEL B. BILLINGSLEY
*Assistant United States Attorney***

**ATTORNEYS FOR APPELLEE
UNITED STATES OF AMERICA**

**United States Attorney's Office
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CLOSED

**U.S. District Court
Northern District of Alabama (Middle)
CRIMINAL DOCKET FOR CASE #: 4:07-cr-00337-VEH-SGC-1**

Case title: USA v. Vasiloff

Date Filed: 08/28/2007

Magistrate judge case number: 4:07-mj-00550-HGD

Date Terminated: 01/17/2008

Assigned to: Judge Virginia Emerson
Hopkins
Referred to: Magistrate Judge Staci G
Cornelius

Appeals court case number: '08-10412
E'

Defendant (1)**Gary Steven Vasiloff***TERMINATED: 01/17/2008*represented by **Robert B Tuten**

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*TERMINATED: 09/26/2008**LEAD ATTORNEY**ATTORNEY TO BE NOTICED**Designation: CJA Appointment***Pending Counts**

18:2251(a)SELLING OR BUYING OF
CHILDREN
(1)

18:2251(a) SELLING OR BUYING OF
CHILDREN
(2-3)

18:2251(a)SELLING OR BUYING OF
CHILDREN
(4-21)

18:2252A(a)(5)(B)ACTIVITIES RE
MATERIAL
CONSTITUTING/CONTAINING
CHILD PORNO
(22)

Disposition

CBP 180 mos as to cts 1-21,
sep/consec; SRT-LIFE; No fine; AF
\$2200.00

CBP 180 mos as to cts 1-21,
sep/consec; SRT-LIFE; No fine; AF
\$2200.00

CBP 180 mos as to cts 1-21,
sep/consec; SRT-LIFE; No fine; AF
\$2200.00

CBP 120 mos as to ct 22, to be served
consec to cts 1-21

Highest Offense Level (Opening)

Felony

Terminated Counts

18:2253 CRIMINAL FORFEITURE IN
VIOLATION OF EXPLOITATION OF
MINORS
(23)

Disposition

Ct 23 - Disposed (Criminal Forfeiture)

Highest Offense Level (Terminated)

Felony

Complaints

18:2252A.F

Disposition**Plaintiff**

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represented by **Alice H Martin, US Attorney**
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ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
08/06/2007	<u>1</u>	SEALED COMPLAINT as to Gary Steven Vasiloff (1). (SHB,) [4:07-mj-00550-HGD] (Entered: 08/08/2007)
08/08/2007		Minute Entry for proceedings held before Judge Harwell G Davis III:Initial Appearance as to Gary Steven Vasiloff held on 8/8/2007; dft deemed eligible for court appointed counsel; Added attorney Robert B Tuten for Gary Steven Vasiloff as cja attorney; govt. requested detention; dft requested continuance to 8/14/07; Detention Hearing and Preliminary Examination set for 8/14/2007 02:00 PM before Magistrate-Judge Harwell G Davis III in Huntsville, AL; dft remanded to custody of USM. (Tape #FTR.) (SHB,) [4:07-mj-00550-HGD] (Entered: 08/08/2007)
08/08/2007		Case unsealed as to Gary Steven Vasiloff (SHB,) [4:07-mj-00550-HGD] (Entered: 08/08/2007)
08/08/2007	<u>2</u>	CJA 20 as to Gary Steven Vasiloff: Appointment of Attorney Robert B Tuten for Gary Steven Vasiloff: Access appointment forms at <u>CJA Forms</u> . Signed by Judge Harwell G Davis III on 8/8/07. (SHB,) [4:07-mj-00550-HGD] (Entered: 08/08/2007)
08/09/2007	<u>4</u>	REQUEST for Disclosure by Gary Steven Vasiloff <i>Discovery</i> (Tuten, Robert) [4:07-mj-00550-HGD] (Entered: 08/09/2007)
08/09/2007	<u>5</u>	MOTION for Disclosure <i>404(b)</i> by Gary Steven Vasiloff. (Tuten, Robert) [4:07-mj-00550-HGD] (Entered: 08/09/2007)
08/09/2007	<u>6</u>	NOTICE OF ATTORNEY APPEARANCE: Robert B Tuten appearing for Gary Steven Vasiloff (Tuten, Robert) [4:07-mj-00550-HGD] (Entered: 08/09/2007)

08/14/2007		Minute Entry for proceedings held before Judge Harwell G Davis III:Detention Hearing and Preliminary Examination as to Gary Steven Vasiloff held on 8/14/2007; testimony of FBI Agent Ed Sims for govt. finding no condition or set of conditions to warrant dft's release and ordered that he be detained pending disposition of case; hrg adj.; dft remanded to custody of USM; written order to be entered (Court Reporter Chanetta Sinkfield.) (SHB,) [4:07-mj-00550-HGD] (Entered: 08/15/2007)
08/15/2007	<u>7</u>	ORDER finding probable cause as to Gary Steven Vasiloff. Signed by Judge Harwell G Davis III on 8/15/07. (SHB,) [4:07-mj-00550-HGD] (Entered: 08/15/2007)
08/15/2007	<u>8</u>	ORDER OF DETENTION as to Gary Steven Vasiloff. Signed by Judge Harwell G Davis III on 8/15/07. (SHB,) [4:07-mj-00550-HGD] (Entered: 08/15/2007)
08/28/2007	<u>9</u>	INDICTMENT as to Gary Steven Vasiloff (1) count(s) 1, 2-3, 4-21, 22, 23. (HBB,) Additional attachment(s) added on 9/7/2007 (HBB,). (Entered: 08/30/2007)
08/30/2007	<u>10</u>	NOTICE OF HEARING as to Gary Steven Vasiloff Arraignment set for Thursday 9/13/2007 09:30 AM before Magistrate Judge Paul W Greene. (HBB,) (Entered: 08/30/2007)
09/05/2007	<u>11</u>	SCHEDULING ORDER AND NOTICE w/Instructions and Deadlines as set out as to Gary Steven Vasiloff. Signed by Judge Paul W Greene on 09/05/07. (SDA) (Entered: 09/05/2007)
09/13/2007		Minute Entry for proceedings held before Judge Paul W Greene:Arr as to Gary Steven Vasiloff (1) Count 1,2-3,4-21,22,23 held on 9/13/2007; dft present w/cja atty Robert Tuten; dft served, waived reading & NG plea entered; dft remanded; hrg adj;(Court Reporter Virginia Flowers)(CJV) (Entered: 09/13/2007)
09/14/2007	<u>12</u>	RESPONSE to by USA as to Gary Steven Vasiloff <i>Response to Defendant's Request for Disclosure</i> (Burrell, Mary) (Entered: 09/14/2007)
10/12/2007	<u>13</u>	ORDER as to Gary Steven Vasiloff: Change of Plea Hearing set for Thursday, 10/18/2007 at 9:30 AM, in Courtroom 6A, before Judge Virginia Emerson Hopkins. Signed by Judge Virginia Emerson Hopkins on 10/12/07. (YMB) (Entered: 10/12/2007)
10/18/2007		Minute Entry for proceedings held before Judge Virginia Emerson Hopkins :Change of Plea Hearing as to Gary Steven Vasiloff held on 10/18/2007. Guilty Plea entered by Gary Steven Vasiloff (1) as to Counts 1,2-3,4-21, and 22. Dft remanded to custody of USM pending sentencing hearing. (Court Reporter Chanetta Sinkfield.) (YMB) (Entered: 10/18/2007)
10/18/2007	<u>14</u>	GUILTY PLEA ADVICE OF RIGHTS CERTIFICATION by Gary Steven Vasiloff. (YMB) (Entered: 10/18/2007)
10/18/2007	<u>15</u>	PLEA AGREEMENT as to Gary Steven Vasiloff. (YMB) (Entered: 10/18/2007)

10/18/2007	<u>16</u>	ORDER as to Gary Steven Vasiloff: Sentencing set for Wednesday, 1/16/2008 at 9:30 AM, in Courtroom 6A, before Judge Virginia Emerson Hopkins. Signed by Judge Virginia Emerson Hopkins on 10/18/07. (YMB) (Entered: 10/18/2007)
01/15/2008	<u>17</u>	MOTION for Forfeiture of Property <i>Preliminary Order of Forfeiture</i> by USA as to Gary Steven Vasiloff. (Ingram, James) (Entered: 01/15/2008)
01/16/2008		ORDER granting <u>17</u> Motion for Preliminary Order of Forfeiture as to Gary Steven Vasiloff (1). Signed by Judge Virginia Emerson Hopkins on 1/16/2008. (DWC,) (Entered: 01/16/2008)
01/16/2008	<u>18</u>	PRELIMINARY ORDER OF FORFEITURE as set out as to Gary Steven Vasiloff.. Signed by Judge Virginia Emerson Hopkins on 1/16/2008. (HBB,) Modified on 1/16/2008 to cm as directed (HBB,). (Entered: 01/16/2008)
01/16/2008		Minute Entry for proceedings held before Judge Virginia Emerson Hopkins :Sentencing held on 1/16/2008 for Gary Steven Vasiloff (1): CBP 180 mos as to cts 1-21, sep/consec; CBP 120 mos as to ct 22, to be served consec to cts 1-21 (for a total sentence of 3900 mos or 325 years); SRT-LIFE w/spec conds: 1)Mental Health, 2)Sex Offender Conds; No fine; AF \$2200.00 due immediately; Ct 23 - Disposed (Criminal Forfeiture). Dft remanded to custody of USM. (Court Reporter Chantetta Sinkfield.) (YMB) (Entered: 01/16/2008)
01/17/2008	<u>19</u>	PRESENTENCE INVESTIGATION REPORT (Sealed) as to Gary Steven Vasiloff filed w/USP (HBB,) (Entered: 01/18/2008)
01/17/2008	<u>20</u>	Sentencing Recommendations (Sealed) as to Gary Steven Vasiloff filed w/USP (HBB,) (Entered: 01/18/2008)
01/17/2008	<u>21</u>	JUDGMENT as to Gary Steven Vasiloff (1), CBP 180 mos as to cts 1-21, sep/consec; SRT-LIFE; No fine; AF \$2200.00; CBP 120 mos as to ct 22, to be served consec to cts 1-21; Ct 23 - Disposed (Criminal Forfeiture). Signed by Judge Virginia Emerson Hopkins on 1/17/2008. (HBB,) (Entered: 01/18/2008)
01/25/2008	<u>22</u>	NOTICE OF APPEAL by Gary Steven Vasiloff re <u>21</u> Judgment, No Filing fee . (Tuten, Robert) Modified on 1/28/2008 to edit filing fee entry (HBB,). (Entered: 01/25/2008)
01/28/2008	<u>23</u>	Transmittal Letter as to Gary Steven Vasiloff re <u>22</u> Notice of Appeal - Final Judgment (HBB,) (Entered: 01/28/2008)
01/28/2008		Transmission of Notice of Appeal and Docket Sheet as to Gary Steven Vasiloff to US Court of Appeals re <u>22</u> Notice of Appeal - Final Judgment (HBB,) (Entered: 01/28/2008)
01/30/2008	<u>24</u>	TRANSCRIPT REQUEST by Gary Steven Vasiloff for proceedings held on 10/18/2007 Plea Hrg; 1/16/2008 Sentencing Hrg before Judge Hopkins, re <u>22</u> Notice of Appeal - Final Judgment cm crtrptr C Sinkfield (DWC,) (Entered: 01/31/2008)
02/01/2008	<u>25</u>	USCA Case Number as to Gary Steven Vasiloff 08-10412 E for <u>22</u> Notice of Appeal - Final Judgment filed by Gary Steven Vasiloff. (SDA) (Entered: 02/01/2008)

02/13/2008	<u>26</u>	TRANSCRIPT REQUEST [Part II/pink] filed by crtrptr Chanetta Sinkfield as to dft Gary Steven Vasiloff for Plea held 10/18/2007, and Sentencing held 1/16/2008 before Judge Hopkins; estimated filing date 3/4/2008 re <u>22</u> Notice of Appeal - Final Judgment (DWC,) (Entered: 02/13/2008)
03/05/2008	<u>27</u>	TRANSCRIPT of Plea Hearing filed as to Gary Steven Vasiloff for dates of 10/18/07 before Judge Hopkins, re <u>22</u> Notice of Appeal - Final Judgment Court Reporter: Chanetta Sinkfield. [Contact court reporter for copy of transcript] (30 Pgs.) (Attachments: # <u>1</u> Signature Page)(SDA) (Entered: 03/06/2008)
03/05/2008	<u>28</u>	TRANSCRIPT Sentencing Hearing filed as to Gary Steven Vasiloff for dates of 01/16/08 before Judge Hopkins, re <u>22</u> Notice of Appeal - Final Judgment Court Reporter: Chanetta Sinkfield. [Contact court reporter for copy of transcript] (25 Pgs.) (Attachments: # <u>1</u> Signature Page)(SDA) (Entered: 03/06/2008)
03/06/2008	<u>29</u>	CERTIFICATE OF READINESS OF RECORD ON APPEAL as to Gary Steven Vasiloff USCA# 08-10412-EE re <u>22</u> Notice of Appeal - Final Judgment; Record consists of 1 vol pleadings, 2 vols cert copies of efiled transcript, and 1 SEALED PSI/REC (HBB,) (Entered: 03/06/2008)
06/19/2008	<u>30</u>	NOTICE of Publication by Gary Steven Vasiloff (Attachments: # <u>1</u> Affidavit of Publication in the Cherokee County Herald)(Ingram, James) (Entered: 06/19/2008)
06/20/2008	<u>31</u>	MOTION for Forfeiture of Property <i>Motion for a Final Order of Forfeiture</i> by USA as to Gary Steven Vasiloff. (Ingram, James) (Entered: 06/20/2008)
06/30/2008	<u>32</u>	ORDER as to Gary Steven Vasiloff re <u>31</u> MOTION for Forfeiture of Property <i>Motion for a Final Order of Forfeiture</i> - this case is on appeal; therefore, it is hereby ORDERED that the Government shall SHOW CAUSE on or before July 11, 2008 why this court has jurisdiction to enter the requested order. Signed by Judge Virginia Emerson Hopkins on 6/30/08. (SDA) (Entered: 07/01/2008)
07/01/2008	<u>33</u>	RESPONSE to by USA as to Gary Steven Vasiloff <i>Government's Response to Court's Order of July 1, 2008</i> (Ingram, James) (Entered: 07/01/2008)
08/08/2008	<u>34</u>	ORDER of USCA (certified copy) dtd 8/7/2008 as to Gary Steven Vasiloff USCA# 08-10412-EE re <u>22</u> Notice of Appeal - Final Judgment; The Govt's motion to dismiss this appeal based on the valid and enforceable sentence appeal waiver in Appellant's plea agreement is GRANTED (ANDERSON, HULL and HILL) (HBB,) (Entered: 08/08/2008)
09/19/2008	<u>35</u>	FINAL ORDER OF FORFEITURE as to Gary Steven Vasiloff, that certain property as set out is hereby FORFEITED to the USA.. Signed by Judge Virginia Emerson Hopkins on 9/19/2008. (DWC,)ccm J Ingram (Entered: 09/19/2008)
09/24/2008	<u>36</u>	MOTION to Withdraw as Attorney by Robert B. Tuten. by Gary Steven Vasiloff. (Tuten, Robert) (Entered: 09/24/2008)
09/26/2008		ORDER granting <u>36</u> Motion to Withdraw as Attorney as to Gary Steven Vasiloff (1). Mr. Vasiloff's appeal has been denied. Mr. Tuten has no continued obligation to represent the defendant. Signed by Magistrate Judge Paul W Greene on 9/26/08. (SJP) (Entered: 09/26/2008)

09/26/2008		Attorney update in case as to Gary Steven Vasiloff. Attorney Robert B Tuten terminated. Pursuant to order dtd 9/26/08 (SDA) (Entered: 09/26/2008)
01/20/2009	<u>37</u>	NOTICE by USCA #08-10412-EE as to dft Gary Steven Vasiloff re <u>34</u> USCA Order; the Supreme Court has denied certiorari; the court's mandate having previously issued, no further action will be taken by this court (DWC,) (Entered: 01/21/2009)
01/14/2010	<u>38</u>	MOTION to Vacate under 28 U.S.C. 2255 (Civil Action 4:10-cv-8001-VEH) Gary Steven Vasiloff. (JLC) Modified text on 7/19/2012 (KWC) (Entered: 01/14/2010)
08/16/2013		Case as to Gary Steven Vasiloff Reassigned to Magistrate Judge Madeline H Haikala. Magistrate Judge Paul W Greene no longer assigned to the case. (HBB,) (Entered: 08/16/2013)
11/20/2013		Case as to Gary Steven Vasiloff Reassigned to Magistrate Judge Paul W Greene. Judge Madeline H (MAG) Haikala no longer assigned to the case. (HBB,) (Entered: 11/20/2013)
12/12/2013	<u>39</u>	ORDER denying <u>38</u> Motion to Vacate (2255) as to Gary Steven Vasiloff (1). Signed by Judge Virginia Emerson Hopkins on 12/4/2013. (JLC) (Entered: 12/12/2013)
05/01/2014		Case as to Gary Steven Vasiloff Reassigned to Magistrate Judge Staci G Cornelius. Magistrate Judge Paul W Greene no longer assigned to the case. (DWC,) (Entered: 05/01/2014)

PACER Service Center			
Transaction Receipt			
07/08/2015 12:42:50			
PACER Login:	xq0004:3388745:4299065	Client Code:	
Description:	Docket Report	Search Criteria:	4:07-cr-00337-VEH-SGC
Billable Pages:	5	Cost:	0.50

APPEAL,CASREF,REPORT & RECOMMEND

U.S. District Court
Northern District of Alabama (Middle)
CIVIL DOCKET FOR CASE #: 4:10-cv-08001-VEH-SGC

Vasiloff v. United States of America
Assigned to: Judge Virginia Emerson Hopkins
Referred to: Magistrate Judge Staci G Cornelius
Case in other court: Eleventh Circuit, 14-10483-A
Cause: 28:2255 Motion to Vacate / Correct Illegal Sentence

Date Filed: 01/14/2010
Date Terminated: 12/04/2013
Jury Demand: None
Nature of Suit: 510 Prisoner: Vacate
Sentence
Jurisdiction: U.S. Government
Defendant

Petitioner**Gary Steven Vasiloff**

represented by **Gary Steven Vasiloff**
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V.

Respondent**United States of America**

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LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
01/14/2010	<u>1</u>	MOTION to Vacate, Set Aside or Correct Sentence (2255), filed by Gary Steven Vasiloff.(JLC) Modified text on 7/19/2012 (KWC) 4:07-cr-337-VEH-PWG (Entered: 01/14/2010)
01/14/2010	<u>3</u>	MOTION for Extension of Time to File Memorandum of Points and Authorities for <u>1</u> Motion Under 28 U.S.C. 2255 by Gary Steven Vasiloff. (JLC,) (Entered: 01/15/2010)
01/15/2010	<u>2</u>	ORDER TO SHOW CAUSE; It is hereby ORDERED that the United States Appear and Show Cause in writing within twenty (20) days from the date of this Order why the relief requested by the Movant should not be granted. Signed by Magistrate Judge Paul W Greene on 1/15/2010. (JLC,) (Entered: 01/15/2010)
01/15/2010	<u>4</u>	ORDER GRANTING <u>3</u> MOTION for Extension of Time until March 15, 2010. The deadline for the Governments response to the Order to show cause is EXTENDED until twenty (20) days after receipt of Mr. Vasiloff's memorandum in support of his 2255 motion. Signed by Magistrate Judge Paul W Greene on 1/15/2010. (JLC,) (Entered: 01/15/2010)
03/15/2010	<u>5</u>	Memorandum of Points & Authorities in Support of <u>1</u> Motion to Vacate/Set Aside/Correct Sentence (2255). (JLC,) (Entered: 03/15/2010)
04/01/2010	<u>6</u>	MOTION to Dismiss 2255 by United States of America. (Attachments: # <u>1</u> Attachment A, # <u>2</u> Attachment B, # <u>3</u> Attachment C)(Burrell, Mary) (Entered: 04/01/2010)
04/05/2010	<u>7</u>	REQUEST for Transcripts to Supplement Motion Under 28 U.S.C. 2255 by Gary Steven Vasiloff. (JLC,) (Entered: 04/05/2010)
04/09/2010	<u>8</u>	REQUEST to Delay Judgment in this Case Until Petitioner's Traverse is Filed by Gary Steven Vasiloff (JLC,) (Entered: 04/09/2010)
04/16/2010	<u>9</u>	MOTION to Strike Government's <u>6</u> MOTION to Dismiss 2255 by Gary Steven Vasiloff. (JLC,) (Entered: 04/16/2010)
05/04/2010		ORDER denying <u>9</u> Defendant's Motion to Strike the Government's Motion to Dismiss <u>6</u> . Signed by Magistrate Judge Paul W. Greene on 5/4/2010. (SJB) (Entered: 05/04/2010)
05/04/2010	<u>10</u>	ORDER that the court deems this case ripe for summary disposition; petitioner has 20 days to file additional evidentiary materials; Signed by Magistrate Judge Paul W Greene on 5/4/2010. (BST) (Entered: 05/04/2010)
05/10/2010	<u>11</u>	Request for Judicial Notice by Gary Steven Vasiloff. (JLC,) (Entered: 05/10/2010)

05/17/2010	<u>12</u>	Preliminary Supplemental Arguments in Opposition to the Government's <u>6</u> Motion to Dismiss filed by Gary Steven Vasiloff. (JLC,) (Entered: 05/17/2010)
05/17/2010	<u>13</u>	NOTICE by Gary Steven Vasiloff. (JLC,) (Entered: 05/17/2010)
05/20/2010	<u>14</u>	RESPONSE to Petitioner's <u>13</u> Notice. (JLC,) (Entered: 05/20/2010)
05/27/2010	<u>15</u>	Supplemental Opposition to Governments' <u>6</u> Motion to Dismiss filed by Gary Steven Vasiloff. (JLC,) (Entered: 05/27/2010)
06/01/2010	<u>16</u>	MOTION to Stay Deadlines by Gary Steven Vasiloff. (JLC,) (Entered: 06/04/2010)
06/08/2010		ORDER denying <u>16</u> Defendant's Motion to Stay Deadlines. Signed by Magistrate Judge Paul W. Greene on 6/8/2010. (SJB) (Entered: 06/08/2010)
01/13/2011	<u>17</u>	Request for Judicial Notice of 9/10/2010 Finding by Magistrate Judge Greene in Baird v. U.S. (07-CO-8020-S) by Gary Steven Vasiloff (JLC,) (Entered: 01/13/2011)
09/09/2011	<u>18</u>	Request for Docket Sheet by Gary Steven Vasiloff. (JLC,) (Entered: 09/09/2011)
09/04/2012	<u>19</u>	MAGISTRATE JUDGE'S FINDINGS & RECOMMENDATION re <u>1</u> Motion to Vacate/Set Aside/Correct Sentence § 2255 filed by Gary Steven Vasiloff. Objections to R&R due by 9/19/2012. Signed by Magistrate Judge Paul W Greene on 9/4/2012. (JLC) (Entered: 09/04/2012)
09/12/2012	<u>20</u>	Clairification of Prior Request by Gary Steven Vasiloff. (JLC) (Entered: 09/12/2012)
10/05/2012		CASE REFERRED to Magistrate-Judge Madeline H Haikala (ASL) (Entered: 10/05/2012)
10/25/2012	<u>21</u>	NOTICE of Non-Receipt by Gary Steven Vasiloff. (JLC) (Entered: 10/25/2012)
10/30/2012	<u>22</u>	ORDER ADOPTING REPORT AND RECOMMENDATIONS and DENYING <u>6</u> Motion to Dismiss 2255 filed by United States of America; terming <u>19</u> REPORT AND RECOMMENDATION; Govt has 21 days to file response; ORDER REFERRING CASE back to Magistrate Judge Magistrate-Judge Madeline H Haikala. Signed by Judge Virginia Emerson Hopkins on 10/30/2012. (KWC) (Entered: 10/30/2012)
10/31/2012		Set Deadlines as to Govt response to 2255: Response due by 11/21/2012. (KWC) (Entered: 10/31/2012)
11/09/2012	<u>23</u>	First MOTION for Extension of Time to File Response/Reply by United States of America. (Burrell, Mary) (Entered: 11/09/2012)
11/09/2012	<u>24</u>	ORDER granting <u>23</u> Motion for Extension of Time to File Response/Reply. The government is granted thirty (30) additional days from the original deadline to file a response. Signed by Magistrate-Judge Madeline H Haikala on 11/9/2011.(KMT). (Entered: 11/09/2012)
11/13/2012		Reset Deadline: Response due by 12/21/2012 (KWC) (Entered: 11/13/2012)

12/19/2012	<u>25</u>	RESPONSE to 2255 <i>Motion</i> filed by United States of America. (Attachments: # <u>1</u> Attachment A)(Burrell, Mary) (Entered: 12/19/2012)
01/14/2013	<u>26</u>	Request by Gary Steven Vasiloff. (JLC) (Entered: 01/14/2013)
01/17/2013	<u>27</u>	ORDER that Movant shall have twenty-one (21) days from the date of this Order to supply any additional evidentiary materials or legal arguments he may wish to offer with regard to whether the motion to vacate is subject to summary disposition. Signed by Magistrate Judge Madeline H Haikala on 1/17/2013. (JLC) (Entered: 01/17/2013)
01/28/2013	<u>28</u>	MOTION for Extension of Time and Notice of Mail Problems by Gary Steven Vasiloff. (JLC) (Entered: 01/28/2013)
01/29/2013	<u>29</u>	ORDER granting <u>28</u> Motion for Extension of Time. Petitioner shall have forty-five (45) days from the date of this Order to supply any additional evidentiary materials or legal arguments he may wish to offer with regard to his 2255 petition. The 45 day period includes a 30 day extension for Mr. Vasiloff's preparation of his submission and 15 days for transmission of this Order to Mr. Vasiloff. Signed by Magistrate Judge Madeline H Haikala on January 29, 2013. (Haikala, Madeline) (Entered: 01/29/2013)
01/31/2013	<u>30</u>	MOTION for Evidentiary Hearing by Gary Steven Vasiloff. (JLC) (Entered: 01/31/2013)
02/25/2013	<u>31</u>	Request with Declarations attached by Gary Steven Vasiloff. (JLC) (Entered: 02/25/2013)
03/04/2013	<u>32</u>	MOTION to Appoint Counsel and Request for Discovery by Gary Steven Vasiloff. (JLC) (Entered: 03/04/2013)
03/04/2013	<u>33</u>	NOTICE by Gary Steven Vasiloff. (JLC) (Entered: 03/04/2013)
03/04/2013	<u>34</u>	REPLY/TRVERSE to <u>25</u> Response filed by Gary Steven Vasiloff. (JLC) (Entered: 03/04/2013)
04/29/2013	<u>35</u>	Supplemental Authorities by Gary Steven Vasiloff. (JLC) (Entered: 04/29/2013)
07/29/2013	<u>36</u>	NOTICE by Gary Steven Vasiloff. (JLC) (Entered: 07/29/2013)
08/14/2013	<u>37</u>	MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION re <u>1</u> Motion to Vacate/Set Aside/Correct Sentence (2255) filed by Gary Steven Vasiloff. Objections to R&R due by 8/29/2013. Signed by Magistrate Judge Madeline H Haikala on 8/14/2013. (JLC) (Entered: 08/14/2013)
08/19/2013	<u>38</u>	Request for Judicial Notice/Supplemental Briefing by Gary Steven Vasiloff. (JLC) (Entered: 08/19/2013)
08/26/2013	<u>39</u>	MOTION for Extension of Time by Gary Steven Vasiloff. (JLC) (Entered: 08/26/2013)
08/26/2013		ORDER granting <u>39</u> Motion for Extension of Time. Any objections by either party to the Report and Recommendation are due by October 1, 2013. Signed by Judge Virginia Emerson Hopkins on 8/26/2013. (Hopkins, Virginia)

		(Entered: 08/26/2013)
08/27/2013		Set Deadlines: Objections to R&R by either party due by 10/1/2013 (KWC) (Entered: 08/27/2013)
09/16/2013	<u>40</u>	OBJECTION to <u>37</u> Report and Recommendations (entitled " Notice of Fraud Upon the Court") w/ a request for an evidentiary hearing by Gary Steven Vasiloff. (CTS,) (Entered: 09/16/2013)
09/30/2013	<u>41</u>	Request for Immunity Letter by Gary Steven Vasiloff. (JLC) (Entered: 09/30/2013)
10/07/2013	<u>42</u>	Objection to Magistrate Judge's <u>37</u> Report & Recommendation filed by Gary Steven Vasiloff. (JLC) (Entered: 10/07/2013)
10/22/2013		CASE REFERRED to Magistrate Judge Paul W Greene. (MSN) (Entered: 10/22/2013)
10/24/2013	<u>43</u>	Request of Status by Gary Steven Vasiloff. (Docket Sheet sent to Movant via USPS on this the 24th day of October, 2013.) (JLC) (Entered: 10/24/2013)
10/24/2013	<u>44</u>	Request to delay ruling and add one exhibit by Gary Steven Vasiloff. (JLC) (Entered: 10/24/2013)
12/02/2013	<u>45</u>	NOTICE of Supplemental Citations by Gary Steven Vasiloff. (JLC) (Entered: 12/02/2013)
12/04/2013	<u>46</u>	MEMORANDUM OPINION AND ORDER DENYING AS MOOT <u>30</u> MOTION for Hearing, DENYING AS MOOT <u>32</u> MOTION to Appoint Counsel. GRANTING IN PART and DENYING IN PART <u>44</u> Request to Delay Ruling and Add One Exhibit. Finally, Petitioner has filed a <u>41</u> Request for Immunity Letter, while not styled as a motion, to the extent that it could be so construed, it is hereby DENIED. The Court is of the Opinion that the Magistrate Judge's <u>37</u> Findings are due to be and are hereby ADOPTED and her <u>37</u> Recommendation is ACCEPTED as set out herein. Signed by Judge Virginia Emerson Hopkins on 12/4/2013. (JLC) (Entered: 12/04/2013)
12/04/2013	<u>47</u>	FINAL JUDGMENT ORDER DISMISSING CASE in accordance with the <u>46</u> Memorandum Opinion entered contemporaneously herewith. Signed by Judge Virginia Emerson Hopkins on 12/4/2013. (JLC) (Entered: 12/04/2013)
01/03/2014	<u>48</u>	REQUEST FOR FINDING by Gary Steven Vasiloff. (AVC) (Entered: 01/07/2014)
02/03/2014	<u>49</u>	NOTICE OF APPEAL as to <u>47</u> Order Dismissing Case, <u>46</u> Memorandum Opinion by Gary Steven Vasiloff. (JLC) (Entered: 02/04/2014)
02/04/2014	<u>50</u>	TRANSMITTAL NOTICE re <u>49</u> Notice of Appeal. (JLC) (Entered: 02/04/2014)
02/04/2014	<u>51</u>	Transmission of Notice of Appeal, Memorandum Opinion, Order and Docket Sheet to US Court of Appeals re <u>49</u> Notice of Appeal. (Attachments: # <u>1</u> Criminal Docket Sheet)(JLC) (Entered: 02/04/2014)
02/06/2014	<u>52</u>	USCA Case Number 14-10483-A and Notification for <u>49</u> Notice of Appeal

		filed by Gary Steven Vasiloff. (JLC) (Entered: 02/06/2014)
02/06/2014	<u>53</u>	ORDER REGARDING CERTIFICATE OF APPEALABILITY IN PRISONER HABEAS CASE; Petitioner has not met the standard required to obtain a Certificate of Appealability. Accordingly, to the extent that the <u>49</u> Notice of Appeal is construed as a Motion for a Certificate of Appealability, it is hereby DENIED. Signed by Judge Virginia Emerson Hopkins on 2/6/2014. (JLC) (Entered: 02/06/2014)
03/28/2014	<u>54</u>	Request by Gary Steven Vasiloff. (JLC) (Entered: 03/28/2014)
04/25/2014	<u>55</u>	MOTION for Leave to Proceed on Appeal In Forma Pauperis by Gary Steven Vasiloff. (JLC) (Entered: 04/25/2014)
04/28/2014		ORDER REFERRING CASE to Magistrate Judge Staci G Cornelius. Signed by Judge Virginia Emerson Hopkins on 4/28/2014. (JLC) (Entered: 04/28/2014)
05/01/2014	<u>56</u>	ORDER DENYING <u>55</u> MOTION for Leave to Proceed On Appeal In Forma Pauperis. Signed by Magistrate Judge Staci G Cornelius on 5/1/2014. (JLC) (Entered: 05/01/2014)
07/22/2014	<u>57</u>	MOTION for Certificate of Appealability by Gary Steven Vasiloff. (Deemed filed 7/18/2014 with the USCA.) (JLC) (Entered: 07/22/2014)
07/23/2014	<u>58</u>	MOTION for Leave to Proceed on Appeal In Forma Pauperis by Gary Steven Vasiloff. (Deemed filed 7/18/2014 in the USCA)(Doc. wouldn't open) (JLC) (Entered: 07/23/2014)
12/09/2014	<u>59</u>	ORDER of USCA GRANTING Appellant's Motion for a Certificate of Appealability and Motion to Proceed on appeal IFP as to <u>49</u> Notice of Appeal filed by Gary Steven Vasiloff. (JLC) (Entered: 12/09/2014)
01/09/2015	<u>60</u>	Appellant's Request for Appellee's Concurrence or Alternatively, Taking of Judicial Notice of the Attorney General's Position <u>49</u> Notice of Appeal. (JLC) (Entered: 01/12/2015)
04/13/2015	<u>61</u>	ORDER of USCA GRANTING in Part and DENYING in Part Petitioner's Motion for Clarification and DENYING AS MOOT Petitioner's Motion to Stay Briefing Schedule.(JLC) (Entered: 04/13/2015)

PACER Service Center			
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07/08/2015 12:39:18			
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Billable Pages:	4	Cost:	0.40

4:07-cr-00337-VEH-SGC

15

FILED

OCT 18 2007

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

MIDDLE DIVISION

UNITED STATES OF AMERICA)

v.)

GARY STEVEN VASILOFF)

)
)
)
)
)

4:07-CR-0337-VEH-PWG

PLEA AGREEMENT

The United States of America and defendant GARY STEVEN VASILOFF
hereby acknowledge the following plea agreement in this case:

PLEA

The defendant agrees to plead guilty to **COUNTS ONE through TWENTY-TWO** and confess **COUNT TWENTY-THREE** of the Indictment filed in the above numbered and captioned matter. In exchange, the United States Attorney, acting on behalf of the United States and through the undersigned Assistant United States Attorney, agrees to recommend the disposition specified below.

TERMS OF THE AGREEMENT

I. MAXIMUM PUNISHMENT:

The Parties understand that the maximum statutory punishment that may be imposed for the crime of Production of Child Pornography, in violation of Title 18, United States Code, Section 2251(a), as charged in COUNTS ONE through TWENTY-ONE, is:

- a. Imprisonment for not less than 15 years nor more than 30 years;
- b. A fine of not more than \$250,000, or,
- c. Both (a and b);
- d. Supervised release for not less than 5 years nor more than life; and
- e. Special Assessment Fee of \$100 per count.

The Parties understand that the maximum statutory punishment that may be imposed for the crime of Possession of Child Pornography, in violation of Title 18, United States Code, Section 2252A(a)(5)(B), as charged in COUNT TWENTY-TWO, is:

- a. Imprisonment for not more than 10 years;
- b. A fine of not more than \$250,000, or,
- c. Both (a and b);
- d. Supervised release for not less than 5 years nor more than life; and
- e. Special Assessment Fee of \$100 per count.

II. FACTUAL BASIS FOR PLEA:

The defendant hereby stipulates to the accuracy of the following information:

The Alabama Department of Human Resources Assessment of Children at Risk officials received information and reported the same to the Cherokee County Sheriff's Office (CCSO), advising that Gary Steven Vasiloff had taken nude photographs of his stepdaughter (age 14) using a dildo and posing in other lewd and lascivious positions, and had downloaded the photos from his digital camera onto his personal computer. It was also alleged that the victim had been given alcoholic beverages before the pictures were taken.

On January 23, 2007, the CCSO executed a state search warrant at Vasiloff's residence. Vasiloff's computer was seized, along with other items of evidence, including a digital camera and a dildo. The CCSO utilized the computer analysis services of the Alabama Computer Forensic Lab to analyze Vasiloff's computer. Vasiloff's computer was analyzed and twenty-one images of child pornography depicting the victim were discovered. Seven additional images of the victim depicting breast nudity were also discovered. In numerous of these pictures, the victim can be seen consuming alcoholic beverages she says were given to her by Vasiloff. The images were produced by a Concord camera, which was manufactured in the People's Republic of

China.

The FBI initiated its investigation into the matter after receiving investigative reports from the CCSO on July 17, 2007. On July 31, 2007, an examiner with the Alabama Computer Forensic Lab provided the FBI with a report of examination of Vasiloff's personal computer. The FBI reviewed the report on July 31, 2007, and confirmed that the images of child pornography were in fact of the victim in question.

On August 8, 2007, Vasiloff was arrested on a federal complaint charging him with Possession of Child Pornography. After waiving his rights pursuant to Miranda, he confessed to producing the images of child pornography depicting his step-daughter. He admitted that the images had been taken at a deceased relative's abandoned house in Cherokee County, Alabama, between the dates of June 23, 2006, and August 14, 2006. He also turned over the Concord camera used to produce the images.

III. RECOMMENDED SENTENCE:

Pursuant to Rule 11(c)(1)(B), Fed.R.Crim.P., the government will recommend the following disposition:

- (a) That the defendant be sentenced within the advisory guideline range as that range is determined by the Court on the date sentence

is pronounced;

(b) In calculating the advisory guideline range, the United States will recommend that the defendant receive the maximum credit for acceptance of responsibility for which he is eligible pursuant to U.S.S.G. § 3E1.1.

(c) That the defendant pay a special assessment fee of \$2200, said amount due and owing as of the date sentence is pronounced.

IV. WAIVER OF RIGHT TO APPEAL AND POST-CONVICTION RELIEF:


As a term and condition of this Plea Agreement I, GARY STEVEN VASILOFF, hereby waive my right to appeal my conviction in this case, any fines, restitution, and/or sentence (including one for revocation of release) that the court might impose upon me, and the right to challenge any sentence so imposed or the manner in which the sentence was determined in any collateral attack, including, but not limited to, a motion brought under 28 U.S.C. § 2255, subject to the following limitations:

The defendant reserves the right to contest in an appeal or post-conviction proceeding:

(a) Any sentence imposed in excess of the applicable statutory maximum sentence(s).

The defendant acknowledges that before giving up these rights, he discussed the Federal Sentencing Guidelines and their application to his case with his attorney, who explained them to his satisfaction. The defendant further acknowledges and understands that the government retains its right to appeal where authorized by statute.

I, GARY STEVEN VASILOFF, hereby place my signature on the line directly below to signify that I fully understand the foregoing paragraphs, and that I am knowingly and voluntarily entering into this waiver.


GARY STEVEN VASILOFF

V. UNITED STATES SENTENCING GUIDELINES:

Counsel has explained to the defendant, that in light of the United States Supreme Court's recent decision in United States v. Booker, 125 S.Ct. 738 (2005), the federal sentencing guidelines are **advisory** in nature. Sentencing is in the court's discretion and is no longer required to be within the guideline range. The defendant agrees that, pursuant to this agreement, the court may use facts it finds by a preponderance of the evidence to reach an advisory guideline range and defendant explicitly waives any right to have those facts found by a jury beyond a reasonable doubt.

VI. AGREEMENT NOT BINDING ON COURT:

The Parties fully and completely understand and agree that it is the Court's duty to impose sentence upon the defendant and that any sentence recommended by the government is **NOT BINDING UPON THE COURT**, and that the Court need not accept the government's recommendation. Further, the defendant understands that if the Court does not accept the government's recommendation, he does not have the right to withdraw his plea.

VII. VOIDING OF AGREEMENT:

The defendant understands that should he (a) violate any federal, state, or local law after entering into this Plea Agreement, (b) move the Court to accept his plea of guilty in accordance with, or pursuant to, the provisions of North Carolina v. Alford, 400 U.S. 25 (1970), or (c) tender a plea of *nolo contendere* to the charges, the agreement will become NULL and VOID, and the United States will not be bound by any of the terms, conditions, or recommendations, express or implied, which are contained therein.

VIII. OTHER DISTRICTS AND JURISDICTIONS:

The parties understand and agree that this agreement **DOES NOT BIND** any other United States Attorney in any other district, or any other state or local authority.

IX. TAX, FORFEITURE AND OTHER CIVIL/ADMINISTRATIVE PROCEEDINGS:

Unless otherwise specified herein, the parties understand and acknowledge that this agreement does not apply to or in any way limit any pending or prospective proceedings related to defendant's **tax liabilities**, if any, or to any pending or prospective **forfeiture** or other **civil** or **administrative** proceedings.

X. DEFENDANT'S UNDERSTANDING:

I have read and understand the provisions of this agreement consisting of eleven (11) pages. I have discussed the case and my constitutional and other rights with my lawyer. I am satisfied with my lawyer's representation in this case. I understand that by pleading guilty, I will be waiving and giving up my right to continue to plead not guilty, to a trial by jury, to the assistance of counsel at that trial, to confront, cross-examine, or compel the attendance of witnesses, to present evidence in my behalf, to maintain my privilege against self-incrimination, and to the presumption of innocence. I agree to enter my plea as indicated above on the terms and conditions set forth herein.

**NO OTHER PROMISES OR REPRESENTATIONS HAVE BEEN
MADE TO ME BY THE PROSECUTOR, OR BY ANYONE ELSE,
NOR HAVE ANY THREATS BEEN MADE OR FORCE USED TO
INDUCE ME TO PLEAD GUILTY.**

I further have been advised, and understand, that under the Sex Offender

Registration and Notification Act, a federal law, I must register and keep the registration current in each of the following jurisdictions: where I reside; where I am an employee; and where I am a student. I understand that the requirements for registration include providing my name, my residence address, and the names and addresses of any places where I am or will be an employee or a student, among other information. I further understand that the requirement to keep the registration current includes informing at least one jurisdiction in which I reside, am an employee, or am a student not later than three business days after any change of my name, residence, employment, or student status. I have been advised, and understand, that failure to comply with these obligations subjects me to prosecution for failure to register under federal law, 18, United States Code, Section 2250, which is punishable by a fine or imprisonment, or both.

I further state that I have not had any drugs, medication, or alcohol within the past 48 hours except as stated hereafter:

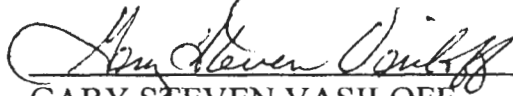
[N/A]
(if none, write "N/A")

I understand that this Plea Agreement will take effect and will be binding as to the Parties **only** after all necessary signatures have been affixed hereto.

I have personally and voluntarily placed my initials on every page of this

Agreement and have signed the signature line below to indicate I have read and approve all of the previous paragraphs of this Agreement, and understand all of the provisions of this Agreement, both individually and as a total binding agreement.

Oct 18, 07
DATE



GARY STEVEN VASILOFF
Defendant

XI. COUNSEL'S ACKNOWLEDGMENT:

I have discussed this case with my client in detail and have advised him of his rights and all possible defenses. My client has conveyed to me that he understands this

Agreement and consents to all its terms. I believe the plea and disposition set forth herein are appropriate under the facts of this case and are in accord with my best judgment. I concur in the entry of the plea as indicated above and on the terms and conditions set forth herein.

10/18/07
DATE


ROBERT TUTEN, ESQ.
Defendant's Counsel

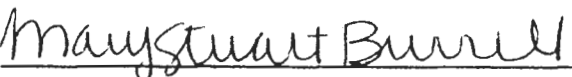
XII. GOVERNMENT'S ACKNOWLEDGMENT:

I have reviewed this matter and concur that the plea and disposition set forth herein are appropriate and are in the interests of justice.

ALICE H. MARTIN
United States Attorney

by:

10-18-2007
DATE


MARY STUART BURRELL
Assistant United States Attorney

22

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Vs.

CASE NO. 4:07-CR-337-VEH-PWG

GARY STEVEN VASILOFF,

Defendant.

NOTICE OF APPEAL

Comes now the Defendant, GARY STEVEN VASILOFF, by and through counsel, and appeals to the United States Court of Appeals for the Eleventh Circuit from the Judgment and Sentence in a Criminal Case decreed by the Honorable Virginia Emerson Hopkins at his sentencing on January 16, 2008.

Respectfully submitted this 25th day of January, 2008.

/s/ Robert B. Tuten

ROBERT B. TUTEN

Attorney for Defendant

223 East Side Square

Huntsville, AL 35801

Phone: (256) 536-6009

Fax: (256) 536-2501

E-Mail: federalct@tutenlaw.com

CERTIFICATE OF SERVICE

I hereby certify that I have this date electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the attorneys of record

This 25th day of January, 2008.

/s/ Robert B. Tuten

Robert B. Tuten

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

UNITED STATES OF AMERICA, *
Plaintiff, *
v. * Case No. CR-07-VEH-0337-M
*
GARY STEVEN VASILOFF, * Birmingham, Alabama
* October 18, 2007
Defendant. * 9:30 a.m.

TRANSCRIPT OF PLEA HEARING
BEFORE THE HONORABLE VIRGINIA EMERSON HOPKINS
UNITED STATES DISTRICT JUDGE

Court Reporter: Chanetta L. Sinkfield, RMR
325 United States Courthouse
1729 Fifth Avenue North
Birmingham, AL 35203

APPEARANCES

FOR THE PLAINTIFF: ALICE H. MARTIN
U.S. ATTORNEY'S OFFICE
Assistant U.S. Attorney,
MARY STUART BURRELL
400 Meridian Street, Suite 304
Huntsville, Alabama 35801

FOR THE DEFENDANT: ROBERT B. TUTEN, ESQ.
TUTEN LAW OFFICES
223 East Side Square
Huntsville, Alabama 35801

Court Reporter: Chanetta L. Sinkfield, RMR
325 United States Courthouse
1729 Fifth Avenue North
Birmingham, Alabama 35203

P R O C E E D I N G S

THE COURT: Good morning. Counsel, we're here today in the matter of the United States of America versus Gary Steven Vasiloff, case number 07-337.

I am looking at the guilty plea advice of rights certification, and it's not certified by counsel for defendant.

MR. TUTEN: Sorry about that, Your Honor. Let me do that real quick.

THE COURT: That will be fine.

MR. TUTEN: We had some last minute revisions to the plea agreement yesterday. We were scrambling around trying to get the material signed, and I just missed that one. I'm sorry about that.

THE COURT: It's not a problem as long as you get it done now.

MR. TUTEN: Thank you, Your Honor.

THE COURT: You're welcome. All right. I see that Ms. Burrell is present and Mr. Tuten, T-u-t-e-n.

MR. TUTEN: Yes, Your Honor.

THE COURT: Mr. Vasiloff, before I can accept the plea of guilty from you, I must inquire about certain matters, and that inquiry will require that you be placed under an oath. I want to point out to you that while you are under

1 that oath, I may ask you questions pertaining to the offense
2 that you are pleading guilty to or other questions relating to
3 matters relevant to your plea of guilty or to matters relevant
4 to sentencing. Any answers to my questions must be full,
5 complete, and accurate because a false answer or false
6 statement could be used against you as a basis for prosecuting
7 you for perjury or false statement. Do you understand?

8 THE DEFENDANT: Yes, ma'am.

9 THE COURT: Okay. Will you speak a little louder,
10 please?

11 THE DEFENDANT: Yes, ma'am.

12 THE COURT: Thank you.

13 Ms. Berry, would you please administer the oath.

14 THE COURTROOM DEPUTY: If you will stand and raise
15 your right hand, please.

16 Do you swear or affirm to speak the truth, the whole
17 truth, and nothing but the truth so help you God?

18 THE DEFENDANT: Yes, ma'am.

19 THE COURTROOM DEPUTY: You may be seated.

20 THE COURT: Mr. Vasiloff, do you have in front of
21 you a copy of a document entitled Guilty Plea Advice of Rights
22 certification stamped filed October 18th, 2007?

23 THE DEFENDANT: Yes, ma'am.

24 THE COURT: Did you and your attorney fill out that
25 document?

1 THE DEFENDANT: Yes, ma'am.

2 THE COURT: Did you understand the information in
3 that document?

4 THE DEFENDANT: Mostly, yes, ma'am.

5 THE COURT: What did you not understand? Is there
6 anything you want to go over with me?

7 THE DEFENDANT: No, ma'am.

8 THE COURT: Can you tell me any parts of it that you
9 do not understand?

10 THE DEFENDANT: It was just the way some of the
11 stuff was worded. Yes, he helped me through it.

12 THE COURT: Now that your lawyer has talked to you
13 about what's in the document, after his explanation, do you
14 understand the document?

15 THE DEFENDANT: Yes, ma'am.

16 THE COURT: Have you within the past 72 hours taken
17 or received any drugs, intoxicants, narcotics, or medication
18 including prescription medication of any kind?

19 THE DEFENDANT: No, ma'am.

20 THE COURT: Do you have any mental impairment that
21 may affect your ability to understand and respond to any
22 questions?

23 THE DEFENDANT: No, ma'am.

24 THE COURT: Do you have any problem understanding
25 the English language that may affect your ability to

1 understand and respond to any questions?

2 THE DEFENDANT: No, ma'am.

3 THE COURT: Mr. Vasiloff, if anything is said here
4 today or if anything takes place here today that you do not
5 fully understand, I want you to interrupt the proceedings and
6 tell me so. Will you do so?

7 THE DEFENDANT: Yes, ma'am.

8 THE COURT: You can either ask me to clear the
9 matter up for you, or you can ask me to allow you to speak in
10 private with your attorney so that he can clear the matter up,
11 and I will permit either of those. Do you understand?

12 THE DEFENDANT: Yes, ma'am.

13 THE COURT: Okay. I have been informed that the
14 microphones aren't working. So everybody just needs to know
15 that we need to speak up.

16 A plea of guilty is often offered in reliance upon some
17 plea bargain or plea agreement between the defendant and his
18 attorney and the U.S. Attorney's Office. Recommended
19 sentences, plea bargains, and plea agreements are permissible,
20 but they are not binding on the court or the judge. When a
21 plea agreement exist and where a defendant is entering his
22 plea of guilty in reliance upon a plea bargain or plea
23 agreement, the defendant and his attorney and the U.S.
24 Attorney's Office all have the obligation to disclose that
25 fact to the Court and to tell the Court the terms and

1 conditions of any plea bargain or plea agreement that the
2 defendant might be relying on at the time he enters his plea
3 of guilty.

4 I have reviewed the plea agreement that has been entered
5 in this case. Do you have a copy in front of you, Mr.
6 Vasiloff?

7 THE DEFENDANT: Yes, ma'am.

8 THE COURT: Did you sign that agreement?

9 THE DEFENDANT: Yes, ma'am.

10 THE COURT: At this time, I am going to ask the
11 Assistant U.S. Attorney, Mary Stewart Burrell, to advise the
12 Court the extent of that office's knowledge of any recommended
13 sentence, plea bargain, or plea agreement upon which this
14 defendant might be relying here today.

15 You may proceed, Ms. Burrell.

16 MS. BURRELL: Yes, ma'am. Your Honor, the
17 defendant, Gary Steven Vasiloff, is going to plead guilty to
18 Counts 1 through 22 of this indictment and Count 23 of the
19 indictment which is a forfeiture allegation. In exchange,
20 Your Honor, the government's going to recommend that the
21 defendant be sentenced within the advisory guideline range as
22 that range is determined by the Court on the date sentence is
23 pronounced. In calculating the advisory guideline range, the
24 United States will recommend that the defendant receive the
25 maximum credit for acceptance of responsibility for which he

1 is eligible and that the defendant pay a special assessment
2 fee of \$2,200. Said amount due and owing as of the date
3 sentence is pronounced.

4 And Your Honor, on pages 5 and 6 of this plea agreement,
5 the defendant, Gary Steven Vasiloff, has waived certain rights
6 to appeal.

7 THE COURT: All right. Mr. Vasiloff, the plea
8 agreement states the government will recommend the maximum
9 appropriate credit for acceptance of responsibility.

10 Mr. Tuten, does the written plea agreement that is in
11 front of you on the table contain everything that you are
12 aware of that your client relying on by way of a plea bargain
13 or plea agreement?

14 MR. TUTEN: Yes, Your Honor, it does.

15 THE COURT: Before your client signed the plea
16 agreement, did you have a sufficient opportunity to fully
17 discuss it with him?

18 MR. TUTEN: Yes, Your Honor. We did discuss it at
19 length. He had various questions about it which I answered.
20 Some of those questions actually resulted in revisions made to
21 some of the wording, especially in the factual rendition of
22 this case. The new agreement was reviewed with him again this
23 morning, and again I answered all the questions that he had
24 about it.

25 THE COURT: And do you feel that you were able to

1 answer any questions that he had concerning the meaning of the
2 agreement or its operation or effect to his satisfaction?

3 MR. TUTEN: Yes, Your Honor, I was.

4 THE COURT: All right. Thank you, Mr. Tuten.

5 Mr. Vasiloff, does the written plea agreement that is on
6 the table in front of you contain everything that you are
7 relying on at this time by way of a plea bargain or plea
8 agreement?

9 THE DEFENDANT: Yes, ma'am.

10 THE COURT: Before you signed the agreement, did you
11 have a sufficient opportunity to review it with your attorney,
12 Mr. Tuten?

13 THE DEFENDANT: Yes, ma'am.

14 THE COURT: Did you have any questions of Mr. Tuten
15 regarding the meaning of the agreement or how it might operate
16 that he did not answer to your satisfaction?

17 THE DEFENDANT: No, ma'am, he answered all of my
18 questions.

19 THE COURT: Mr. Vasiloff, the plea agreement that
20 you have entered contains language waiving some or all of your
21 rights to plea agreement the sentence to be imposed. Under
22 certain circumstances, the defendant can waive his or her
23 right to appeal, and that type of a waiver may be enforceable.
24 However, if you believe that the waiver that is in your plea
25 agreement is not enforceable, you can appeal the sentence and

1 present that theory to the appellate court.

2 When you signed the plea agreement, did you understand
3 that you were giving up some or all of your rights to appeal?

4 THE DEFENDANT: Yes, ma'am.

5 THE COURT: Do you understand that the U.S.
6 Attorney's Office is required to comply with any obligations
7 imposed upon it by the plea agreement, but that the plea
8 agreement is not binding on the Court Or the Judge?

9 THE DEFENDANT: Yes, ma'am.

10 THE COURT: In other words, do you understand, Mr.
11 Vasiloff, that if I accept your plea of guilty, when I impose
12 a sentence, I could structure a sentence that is totally
13 consistent with the plea agreement or recommendations made by
14 the U.S. Attorney's Office, or I could structure a sentence
15 that could be viewed as substantially more severe or
16 substantially less severe than the contemplated sentence, and
17 yet you would have no right to withdraw the plea of guilty you
18 were in the process of entering? Do you fully understand
19 that?

20 THE DEFENDANT: Yes, ma'am.

21 THE COURT: Other than what is set forth in the plea
22 agreement, has anyone promised you anything to encourage you
23 to enter this plea of guilty?

24 THE DEFENDANT: No, ma'am.

25 THE COURT: Has anyone threatened you in anyway to

1 encourage you to enter this plea of guilty?

2 THE DEFENDANT: No, ma'am.

3 THE COURT: Do you understand that if the Court
4 accepts your plea of guilty, all that remains is for a
5 sentence to be imposed?

6 THE DEFENDANT: Yes, ma'am.

7 THE COURT: I am confident that your attorney has
8 discussed with you the charges asserted in the indictment and
9 the maximum penalties that you could face; however, part of my
10 responsibility today is to make sure that you do indeed
11 understand the charges against you, what the government would
12 have to prove at a trial, and the possible penalties that you
13 could face. Therefore, I want to go over those matters with
14 you.

15 Do you understand that the maximum penalties include as
16 to Counts 1 through 21: A fine of not more than \$250,000.
17 And this applies to each count, so there's 21 counts. So
18 that's 21 times \$250,000. Custody of not less than 15 years
19 and not more than 30 years; again that is each count.
20 Further, if you have a prior conviction of certain types of
21 related offenses, then the custodial term becomes not less
22 than 25 years and not more than 50 years. And if you have two
23 prior convictions of certain related offenses, then the
24 custodial term becomes not less than 35 years and not more
25 than life.

1 There is no allegation that anyone died as a result of
2 anything that Mr. Vasiloff did?

3 MS. BURRELL: No, Your Honor.

4 THE COURT: All right. Your supervised release
5 period following your term of custodial confinement under
6 Counts 1 through 21 for each count is any term of years not
7 less than five years and not more than life. There is an
8 assessment fee of \$100 for each count. Restitution does
9 apply, and the guidelines also apply.

10 As to Count 22, the maximum penalty is a fine of not more
11 than \$250,000. The custodial term is not more than ten years,
12 however, if you had been convicted on one or more prior
13 instances of certain related offenses, then the maximum
14 penalty under Count 22 becomes not less than ten and not more
15 than 20 years. Your custodial term would be followed by
16 supervised release term of any term of years not less than
17 five years and not more than life. There is an assessment fee
18 of \$100. Restitution does apply, and the guidelines although
19 advisory also apply.

20 Count 23 is a forfeiture count, and I am going to ask you
21 if you understand the property that the government -- I'll ask
22 you later if you understand the property that the government
23 seeks forfeiture from you regarding. We'll go over that
24 separately, but it is not a custodial count; it is a
25 forfeiture count where you would lose assets. Assets would be

1 taken from you.

2 Do you understand the maximum penalties that I have just
3 outlined?

4 THE DEFENDANT: Yes, ma'am.

5 THE COURT: Do you also understand that in
6 determining a sentence, the Court must consider applicable
7 sentencing guidelines but may depart from those guidelines?

8 THE DEFENDANT: Yes, ma'am.

9 THE COURT: Have you had sufficient opportunity and
10 time to discuss the guidelines and the fact that they are
11 merely advisory with your attorney?

12 THE DEFENDANT: Yes, ma'am.

13 THE COURT: Mr. Tuten, have you completely discussed
14 with and advised Mr. Vasiloff regarding the sentencing
15 guidelines and the fact that they're merely advisory, that is,
16 not binding on this Court?

17 MR. TUTEN: Yes, Your Honor, I have.

18 THE COURT: Thank you.

19 Mr. Vasiloff, do you also understand that you have a
20 right to insist upon a plea of not guilty?

21 THE DEFENDANT: Yes, ma'am.

22 THE COURT: Do you understand that if you plead not
23 guilty, the burden is upon the government to prove your guilt
24 to a jury beyond a reasonable doubt at a trial where you would
25 have the right to the assistance of a lawyer and the right not

1 to be compelled to incriminate yourself or give evidence
2 against yourself, but that with this plea of guilty, there
3 will be no right to confront and cross-examine the witnesses
4 and the evidence? Do you understand that you are giving up
5 all those rights and protections?

6 THE DEFENDANT: Yes, Your Honor.

7 THE COURT: Is there anything, Mr. Vasiloff that
8 prevents you from understanding anything that I am saying to
9 you at this time?

10 THE DEFENDANT: No, Your Honor.

11 THE COURT: Is there anything that prevents you from
12 understanding anything your attorney says to you when he
13 discusses this matter with you?

14 THE DEFENDANT: No, Your Honor.

15 THE COURT: Is there anything that prevents you from
16 understanding the nature of the charges against you?

17 THE DEFENDANT: No, Your Honor.

18 THE COURT: Is there anything that prevents you from
19 understanding the nature and purpose of these proceedings here
20 today?

21 THE DEFENDANT: No, Your Honor.

22 THE COURT: In the indictment in Counts 1 through
23 21, the grand jury charged that on or about a date between the
24 23rd day of June 2006 and the 14th day of August, 2006, in
25 Cherokee County within the Northern District of Alabama, the

1 defendant, Gary Steven Vasiloff did employ, use, persuade,
2 induce and entice a minor to engage in sexually explicit
3 conduct for the purpose of producing a visual depiction of
4 such conduct. And I will go through specifically the items.
5 Said visual depiction which was produced using materials that
6 had been mailed, shipped, and transported in interstate and
7 foreign commerce in violation of Title 18, United States Code
8 Section 2251. In Count 1, the visual depiction is a
9 photograph that's referred to as Exhibit 1. In Count 2, the
10 visual depiction is a photograph that's referred to as Exhibit
11 2. In Count 3, the visual depiction is a photograph that is
12 referred to as Exhibit 3. In Count 4, the visual depiction is
13 a photograph that's referred to as Exhibit 4. In Count 5, the
14 visual depiction is a photograph that's referred to as Exhibit
15 5. In Count 6, the visual depiction is a photograph that's
16 referred to as Exhibit 6. In Count 7, the visual depiction is
17 a photograph referred to as Exhibit 7. In Count 8, the visual
18 depiction is a photograph referred to as Exhibit 8. In Count
19 9, the visual depiction is a photograph that's referred to as
20 Exhibit 9. In Count 10, the visual depiction is a photograph
21 that's referred to as Exhibit 10. In Count 11, the visual
22 depiction is a photograph referred to as Exhibit 11. In Count
23 12, the visual depiction is a photograph that's referred to as
24 Exhibit 12. In Count 13, the visual depiction is a photograph
25 that's referred to as Exhibit 13. In Count 14, the visual

1 depiction is a photograph that's referred to as Exhibit 14.

2 In Count 15, the visual depiction is a photograph that's

3 referred to as Exhibit 15. In Count 16, the visual depiction

4 is a photograph that's referred to as Exhibit 16. In Count

5 17, the visual depiction is a photograph that's referred to as

6 Exhibit 17. In Count 18, the visual depiction is a photograph

7 referred to as Exhibit 18. In Count 19, the visual depiction

8 is a photograph referred to as Exhibit 19. In Count 20, the

9 visual depiction is a photograph referred to as Exhibit 20.

10 In Count 21, the visual depiction is a photograph referred to

11 as Count 21.

12 Have you seen all of those exhibits?

13 THE DEFENDANT: Yes, ma'am.

14 THE COURT: In Count 21 -- I'm sorry. In Count 22,

15 the grand jury charged that on or about the 23rd day of

16 January 2007, in Cherokee County within the Northern District

17 of Alabama, the defendant, Gary Steven Vasiloff, did knowingly

18 possess material that contained images of child pornography

19 that was produced using materials that had been mailed,

20 shipped, and transported in interstate and foreign commerce in

21 violation of Title 18, United States Code Section

22 2252A(a)(5)(B). In Count 23, the grand jury refers to the

23 allegations of Counts 1 through 22 and states that you are

24 being notified that upon conviction of the offenses listed in

25 Counts 1 and 2 of the indictment, the government is seeking

1 forfeiture of any real or personal property used or intended
2 to be used to promote or commit the commission -- to promote
3 the commission of or to commit the offense alleged in either
4 Count 1 or Count 2 or both.

5 Further, you are notified that if the property that they
6 seek forfeiture of as a result of any act or omission by you
7 can't be located, has been transferred, has been placed beyond
8 the jurisdiction of the Court, has been substantially
9 diminished in value or has been commingled with other party or
10 property which cannot be divided without difficulty, the
11 United States intends to seek forfeiture of any other property
12 that is yours up to the value of the forfeitable property.

13 Before there could be a conviction under Counts 1 through
14 22 and forfeiture under 23 as charged, were those charges to
15 go to a trial, the government would have the burden of proving
16 beyond a reasonable doubt the following: Title 18, United
17 States Code Section 2251(a) makes it a federal crime or
18 offense for any person to knowingly employ, use, persuade,
19 induce, entice, or coerce any minor to engage in any sexually
20 explicit conduct for the purpose of producing a visual
21 depiction of such conduct when the visual depiction was
22 produced using materials that had been mailed, shipped, and
23 transported in interstate or foreign commerce by any means.
24 You are charged with an offense under 18 U.S.C. Section
25 2251(a) in Counts 1 through 21 inclusive. You can be found

1 guilty of the offenses charged in Counts 1 through 21
2 inclusive or any of them only if all of the following facts
3 are proved beyond a reasonable doubt.

4 First, that you knowingly employed, used, persuaded,
5 induced, enticed, or coerced any minor to engage in any
6 sexually explicit conduct as charged; second, that you did so
7 for the purpose of producing a visual depiction of such
8 conduct as charged; and third, that the visual depiction was
9 produced using materials that had been mailed, shipped, and
10 transported in interstate or foreign commerce as charged. And
11 again, the visual depictions are the exhibits that are listed
12 in each count, and you said you had seen those exhibits.

13 THE DEFENDANT: Yes, ma'am.

14 THE COURT: The term "minor" means any person under
15 the age of 18 years. The term "sexually explicit conduct"
16 means actual simulated sexual intercourse whether between
17 persons of the same or opposite sex. Bestiality,
18 masturbation, sadistic or masochistic abuse, lascivious,
19 exhibition of the genitals or pubic area of any person. The
20 term "producing" means producing, directing, manufacturing,
21 issuing, publishing, or advertising. The term "visual
22 depiction" includes but is not limited to undeveloped film and
23 videotape and data stored on computer disk or by electronic
24 means which is capable of conversion into a visual image.

25 The term "interstate or foreign commerce" means movement

1 of property from one state to another state or from one state
2 to another state. The term "state" includes any state of the
3 United States, District of Columbia, and any commonwealth,
4 territory, or possession of the United States. The word
5 "knowingly" means that the act had to be done voluntarily and
6 intentionally and not because of a mistake or an accident.

7 In Counts 22, you are charged with violating 18 U.S.C.
8 Section 2252A(a)(5)(B).

9 (Pause.)

10 THE COURT: Title 18, United States Code Section
11 2252A(a)(5)(B), makes it a federal crime or offense for any
12 person to knowingly possess any book, magazine, periodical,
13 film, videotape, computer disk, or any other material that
14 contains an image of child pornography that has been mailed or
15 shipped or transported in interstate or foreign commerce by
16 any means including by computer or that was produced using
17 materials that had been mailed or shipped or transported in
18 interstate or foreign commerce by any means including by
19 computer.

20 You can be found guilty of that offense only if all of
21 the following facts are proved beyond a reasonable doubt.
22 That you knowingly possessed an item or items of child
23 pornography as charged; that such items of child pornography
24 had been transported or shipped or mailed in interstate or
25 foreign commerce including by computer as charged; and that at

1 the time of such possession you believed that such items
2 constituted or contained child pornography.

3 I have already explained interstate or foreign commerce.
4 The term "child pornography" means any visual depiction
5 including any photograph, film, video, picture, or computer or
6 computer-generated image or picture whether mailed, produced
7 by electronic, mechanical, or other means of sexual explicit
8 conduct where the production of such visual depiction involves
9 use of minor engaging in sexually explicit conduct, or such
10 visual depiction has been created, adapted, or modified to
11 appear that an identifiable minor engaged in sexually explicit
12 conduct. I have explained the term "minor." I don't think we
13 have an identifiable minor issue.

14 MS. BURRELL: No, Your Honor, we do not.

15 THE COURT: I have explained visual depiction. I
16 have explained sexually explicit conduct, and I have explained
17 knowingly. The same explanation applies.

18 MS. BURRELL: Your Honor?

19 THE COURT: Yes.

20 MS. BURRELL: May I clarify the question that you
21 just asked me? We do know who the minor was in these
22 pictures.

23 THE COURT: Right. So there's not a charge of
24 having created, adapted, or modified a visual depiction to
25 appear that an identifiable minor. The charge is there is an

1 actual minor engaging in sexually explicit conduct.

2 MS. BURRELL: That's right, Your Honor.

3 THE COURT: Right. 18 U.S.C. Section 2253 which
4 relates to Count 23 is the forfeiture count, and this title
5 provides that a person who is convicted of an offense
6 including the offenses that are listed in Counts 1 and 2 of
7 the complaint, I'm sorry, the indictment, is subject to the
8 forfeiture of certain property, specifically the visual
9 depictions or any book, magazine, periodical, film, videotape
10 or other matters which contains any such visual depiction
11 which was produced, transported, mailed, shipped or received
12 in violation of the law; any property real or personal
13 constituting or traceable to gross profits or other proceeds
14 obtained from such offense; and any property real or personal
15 used or intended to be used to commit or promote the
16 commission of such an offense or any property traceable to
17 such property.

18 Mr. Vasiloff, do you understand the charges against you?

19 THE DEFENDANT: Yes, ma'am.

20 THE COURT: Have you had sufficient time to discuss
21 these charges with your attorney, Mr. Tuten?

22 THE DEFENDANT: Yes, Your Honor.

23 THE COURT: Are you satisfied with your attorney and
24 the work he has done for you?

25 THE DEFENDANT: Yes, Your Honor.

1 THE COURT: Now I need to ask Mr. Tuten. Mr.
2 Tuten, are you satisfied that Mr. Vasiloff fully understands
3 the charges against him and the consequences of his entering a
4 plea of guilty to those charges?

5 MR. TUTEN: Yes, Your Honor, I am.

6 THE COURT: Are you also satisfied that he's
7 knowingly and voluntarily entering his plea of guilty?

8 MR. TUTEN: Yes, Your Honor, I am so satisfied he
9 does understand that. We had several opportunities to discuss
10 the indictment. During those discussions Mr. Vasiloff asked
11 some very good questions which revealed to me that he
12 understood our discussions and was able to contemplate not
13 only the meaning but also the consequences of a guilty plea
14 related in those charges, and upon answering his questions, he
15 told me that he did understand everything that we had
16 discussed.

17 THE COURT: All right. Did you just say whether or
18 not you were satisfied that he is knowingly and voluntarily
19 entering his plea of guilty?

20 MR. TUTEN: Yes, Your Honor.

21 THE COURT: All right. Have you had sufficient time
22 to investigate the charges against Mr. Vasiloff, to consider
23 any possible defenses he might have to those charges, and
24 generally to give him counsel and advice?

25 MR. TUTEN: Yes, I have, Judge.

1 THE COURT: All right. Mr. Vasiloff, I want you to
2 listen carefully to what the Assistant U.S. Attorney is about
3 to say because she is now going to outline for you and for me
4 some of the evidence she would offer to a jury if this case
5 were to go to a trial. If she says anything that you do not
6 think is true or that you do not think she can prove, I want
7 you to interrupt her and tell me so. Do you understand?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: You may raise your hand or you may have
10 your attorney, Mr. Tuten, let me know what you feel Ms.
11 Burrell has said that is not true, is incorrect, that you
12 disagree with or that you do not believe the government can
13 prove. Now, listen very closely.

14 Ms. Burrell, what would the government expect to prove
15 were this case to proceed to trial?

16 MS. BURRELL: Your Honor, had we gone to trial, the
17 government would have proven that the Alabama Department of
18 Human Resources Assessment of Children at Risk Officials
19 received information and reported the same to the Cherokee
20 County Sheriff's Office, which I will refer to as CCSO,
21 advising that Gary Steve Vasiloff had taken nude photographs
22 of his stepdaughter, age 14, using a dildo and posing in other
23 rude and lascivious positions and had downloaded the photos
24 from his digital camera onto his personal computer. It was
25 also alleged that the victim had been given alcoholic

1 beverages before the pictures were taken.

2 On January 23rd, 2007, the CCSO executed a state search
3 warrant at Vasiloff's residence. Vasiloff's computer was
4 seized along with other items of evidence including a digital
5 camera and a dildo. The CCSO utilized the computer analysis
6 services of the Alabama Computer Forensic Lab to analyze
7 Vasiloff's computer. Vasiloff's computer was analyzed and 21
8 images of child pornography depicting the victim were
9 discovered. Seven additional images of the victim depicting
10 breast nudity were also discovered. In numerous of these
11 pictures, the victim can be seen consuming alcoholic
12 beverages, which she says and would have testified to were
13 given to her by Vasiloff. The images were produced by a
14 camera which was manufactured in the People's Republic of
15 China.

16 The FBI initiated its investigation into the matter after
17 receiving investigating reports from the CCSO on July 17th of
18 2007. On July 31st, 2007, an examiner with the Alabama
19 Computer Forensic Lab provided the FBI with a report of
20 examination of Vasiloff's personal computer. The FBI reviewed
21 the report on July 31st, 2007 and confirmed that the images of
22 child pornography were in fact of the victim in question.

23 On August 8th of 2007, Vasiloff was arrested on a federal
24 complaint charging him with possession of child pornography.
25 After waiving his rights pursuant to Miranda, he confessed to

1 producing the images of a child, depicting his stepdaughter.
2 He admitted that the images had been taken at a deceased
3 relative's abandoned house in Cherokee County, Alabama,
4 between the dates of June 23rd, 2006 and August 14th of 2006.
5 He also turned over the camera used to produce the images.

6 THE COURT: Mr. Vasiloff, you have heard Ms. Burrell
7 outline briefly certain of the facts the government would
8 expect to prove at trial. Are these facts substantially
9 correct?

10 THE DEFENDANT: Yes, Your Honor.

11 THE COURT: She said that you made some confessions
12 and admissions after you were arrested and after you had
13 waived your rights pursuant to Miranda versus Arizona. Did
14 you, before you confessed to producing the images and admitted
15 the images had been taken at a deceased relative's abandoned
16 house, were you advised of your rights under that case?

17 THE DEFENDANT: Yes, Your Honor.

18 THE COURT: And did you waive those rights?

19 THE DEFENDANT: Yes, Your Honor.

20 THE COURT: Were any threats or promises associated
21 with the statements that you made after you were arrested
22 relating to your confessions and admissions?

23 THE DEFENDANT: No, Your Honor.

24 THE COURT: Gary Steven Vasiloff, how do you plead?

25 THE DEFENDANT: Guilty.

1 THE COURT: Did you do the things the Assistant U.S.
2 Attorney said you did?

3 THE DEFENDANT: Yes, Your Honor.

4 THE COURT: Mr. Vasiloff, do you understand that you
5 are not required to enter a plea of guilty and you are free at
6 this time, but this would be the last time you will be free to
7 withdraw your plea of guilty and reinstate your earlier plea
8 of not guilty? Do you understand that?

9 THE DEFENDANT: Yes, Your Honor.

10 THE COURT: Have you heard anything here today that
11 causes you to want to reconsider your decision to enter a plea
12 of guilty?

13 THE DEFENDANT: No, Your Honor.

14 THE COURT: Do you still desire to enter a plea of
15 guilty?

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: Mr. Vasiloff, how do you plead to Count
18 1 of the indictment as charged?

19 THE DEFENDANT: Guilty.

20 THE COURT: How do you plead to Count 2 of the
21 indictment as charged?

22 THE DEFENDANT: Guilty.

23 THE COURT: How do you plead to Count 3 of the
24 indictment as charged?

25 THE DEFENDANT: Guilty.

1 THE COURT: How do you plead to Count 4 of the
2 indictment as charged?

3 THE DEFENDANT: Guilty.

4 THE COURT: How do you plead to Count 5 of the
5 indictment as charged?

6 THE DEFENDANT: Guilty.

7 THE COURT: How do you plead to Count 6 of the
8 indictment as charged?

9 THE DEFENDANT: Guilty.

10 THE COURT: How do you plead to Count 7 of the
11 indictment as charged?

12 THE DEFENDANT: Guilty.

13 THE COURT: How do you plead to Count 8 of the
14 indictment as charged?

15 THE DEFENDANT: Guilty.

16 THE COURT: How do you plead to Count 9 of the
17 indictment as charged?

18 THE DEFENDANT: Guilty.

19 THE COURT: How do you plead to Count 10 of the
20 indictment as charged?

21 THE DEFENDANT: Guilty.

22 THE COURT: How do you plead to Count 11 of the
23 indictment as charged?

24 THE DEFENDANT: Guilty.

25 THE COURT: How do you plead to Count 12 of the

1 indictment as charged?

2 THE DEFENDANT: Guilty.

3 THE COURT: How do you plead to Count 13 of the
4 indictment as charged?

5 THE DEFENDANT: Guilty.

6 THE COURT: How do you plead to Count 14 of the
7 indictment as charged?

8 THE DEFENDANT: Guilty.

9 THE COURT: How do you plead to Count 15 of the
10 indictment as charged?

11 THE DEFENDANT: Guilty.

12 THE COURT: How do you plead to Count 16 of the
13 indictment as charged?

14 THE DEFENDANT: Guilty.

15 THE COURT: How do you plead to Count 17 of the
16 indictment as charged?

17 THE DEFENDANT: Guilty.

18 THE COURT: How do you plead to Count 18 of the
19 indictment as charged?

20 THE DEFENDANT: Guilty.

21 THE COURT: How do you plead to Count 19 of the
22 indictment as charged?

23 THE DEFENDANT: Guilty.

24 THE COURT: How do you plead to Count 20 of the
25 indictment as charged?

1 THE DEFENDANT: Guilty.

2 THE COURT: How do you plead to Count 21 of the
3 indictment as charged?

4 THE DEFENDANT: Guilty.

5 THE COURT: How do you plead to Count 22 of the
6 indictment as charged?

7 THE DEFENDANT: Guilty.

8 THE COURT: Do you consent to the forfeiture under
9 Count 23?

10 THE DEFENDANT: Yes, Your Honor.

11 THE COURT: The Court finds that the defendant's
12 plea of guilty is freely, voluntarily, understandingly, and
13 knowingly offered by him, and that the requisite factual basis
14 for the plea does exist. The plea of guilty is accepted by
15 the Court as to Counts 1 through 22 inclusive, and the
16 defendant's consent to forfeiture under Count 23 is accepted
17 by the Court.

18 The probation office will was probably need eight weeks
19 to complete the presentence investigation report. The
20 defendant and his attorney are then allowed 35 days to review
21 that report. I will enter an order setting sentencing
22 approximately ninety days from today. Actually, I can give
23 you the exact date: January 16th, 2008 at 9:30.

24 I will now call your attention to the fact that my
25 written order will require you to file any objections to the

1 presentence report in writing with the Clerk of Court and
2 serve the probation office with a copy within 14 calendar days
3 from the date you receive the report. The same deadlines
4 apply to the government. I will not consider any objections
5 not filed in advance as ordered unless you can provide me with
6 a good reason for not complying with my order. You should
7 receive the order setting sentencing today.

8 Mr. Vasiloff, you are remanded to the custody of the
9 United States Marshal. That concludes this hearing.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

UNITED STATES OF AMERICA, *
Plaintiff, *
* Case No. CR-07-VEH-0337-M
v. *
*
GARY STEVEN VASILOFF, * Birmingham, Alabama
* January 16, 2008
Defendant. * 9:30 a.m.

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE VIRGINIA EMERSON HOPKINS
UNITED STATES DISTRICT JUDGE

Court Reporter: Chanetta L. Sinkfield, RMR
325 United States Courthouse
1729 Fifth Avenue North
Birmingham, AL 35203

APPEARANCES

FOR THE PLAINTIFF: ALICE H. MARTIN
U.S. ATTORNEY'S OFFICE
Assistant U.S. Attorney,
MARY STUART BURRELL
400 Meridian Street, Suite 304
Huntsville, Alabama 35801

FOR THE DEFENDANT: ROBERT B. TUTEN, ESQ.
TUTEN LAW OFFICES
223 East Side Square
Huntsville, Alabama 35801

Court Reporter: Chanetta L. Sinkfield, RMR
325 United States Courthouse
1729 Fifth Avenue North
Birmingham, Alabama 35203

P R O C E E D I N G S

THE COURT: Good morning. The matter before the court is the case of the United States of America versus Gary Steven Vasiloff, case number 07-337. Would counsel please identify yourselves for the record?

MS. BURRELL: Mary Stewart Burrell with the U.S. Attorney's Office.

MR. TUTEN: Robert Tuten from Huntsville, Alabama for Mr. Vasiloff.

THE COURT: Mr. Tuten, have you and your client had 35 days in which to review the presentence report?

MR. TUTEN: We have, Your Honor.

THE COURT: Do you have any objections to any of the content of the report?

MR. TUTEN: No, Your Honor. The report is thorough and complete as usual.

THE COURT: In compliance with Justice Breyer's majority opinion in United States versus Booker, this Court, while not bound to apply the guidelines has consulted them and has taken them into account on the issue of the appropriate range of sentence to be imposed in this case. In that regard, the Court notes that in his plea agreement, the defendant admitted certain facts that bear upon the computation of his offense level under the guidelines.

1 I am sure you haven't seen it, Mr. Tuten, because it
2 wasn't filed until yesterday and I didn't sign it until this
3 morning, but I did grant the government's motion for
4 preliminary order of forfeiture.

5 MR. TUTEN: Yes, Your Honor. I was anticipating
6 that and Ms. Burrell and I had spoken about that. I did not
7 see it, but she did inform me of it and showed me those
8 pleadings this morning. We were anticipating that and Mr.
9 Vasiloff consented to the forfeiture, Your Honor. There's
10 really not an issue, but I appreciate you bringing that to our
11 attention.

12 THE COURT: Well, it will become final at this
13 sentencing.

14 MR. TUTEN: Yes, Your Honor.

15 THE COURT: All right. There being no objections,
16 the Court adopts the factual statements contained in the
17 presentence report and makes specific findings that the
18 guidelines offense level is 43, the criminal history category
19 is 1, and the advisory guideline imprisonment term is life.
20 However, the defendant will be sentenced within the statutory
21 limitations set forth in U.S. Sentencing Guidelines Section
22 5G1.2(d). Further, the supervised release period is any term
23 of years not less than five years up to life, and the fine
24 range is from \$25,000 to \$250,000. Restitution is not being
25 sought in this case. Are there any motions for departure?

1 MS. BURRELL: None from the government, Your Honor.

2 MR. TUTEN: Judge, yes, for Mr. Vasiloff.

3 THE COURT: I am also going to ask if there are
4 motions for variance. And a motion for a departure is when
5 you ask me to go up or down, and since you represent the
6 defendant it will be down, for a reason that it's a
7 guidelines-based reason. A variance would be when you ask me
8 to go down based simply on the reasonableness of the sentence.

9 MR. TUTEN: That's correct, Your Honor. And I think
10 our position would be more in the area of a variance than a
11 departure.

12 THE COURT: That's what I was anticipating. What I
13 am going to do is ask you if you have anything to say in
14 mitigation or otherwise, all of you, and then I am going to
15 ask if there are any motions for a variance. Or perhaps you
16 want to argue your motion for variance as part of your
17 mitigation statement, and that would be fine.

18 MR. TUTEN: Yes, ma'am.

19 THE COURT: Mr. Tuten, do you have anything to say
20 in mitigation or otherwise before the Court pronounces
21 sentence in this case?

22 MR. TUTEN: I do, Your Honor, and Mr. Vasiloff, as
23 well would like to make a statement to the Court at the
24 appropriate time. But I guess primarily he is concerned that
25 the Court understands his remorse of what has happened here.

1 It's certainly very serious. He acknowledges that and he
2 knows that this is something that he never should have done,
3 but unfortunately it has happened, and we now have to deal
4 with it, and he is prepared to do so.

5 But Judge, there are certain things about the facts of
6 this case and I think would suggest to the Court a more
7 lenient sentence than what the guidelines suggest and possibly
8 what other things about the case might suggest. First of all,
9 Your Honor, Mr. Vasiloff has virtually no adult criminal
10 record. I think the only thing probation was able to find was
11 a driver's license violation some years ago. Now he himself
12 admitted to the probation department that he had had a
13 juvenile offense many, many years ago regarding some sort of
14 stolen automobile. And they were not able to confirm or
15 verify that, of course, maybe one because it was a juvenile
16 case, but also because of how long ago that may have happened.
17 But he readily admitted that to the Court, Your Honor, and to
18 the probation department.

19 He is over 50 years old. It is very unlikely that he is
20 going to be in any more trouble, certainly, not be before a
21 court again. He has accepted the responsibility for what he's
22 done in this case. He did that from the very beginning, long
23 before the federal government was involved in the
24 investigation.

25 I have not been able to get anyone from the government to

1 confirm or deny this one way or the other, but Mr. Vasiloff
2 states that the photographs that were seized and recovered by
3 the investigators had been deleted some time before this
4 investigation even began. Now, I don't understand the
5 computer science behind it, Your Honor, but apparently when
6 you hit the delete button on a computer and erase something
7 from the random access memory of the computer, it doesn't
8 necessarily wipe it off the hard drive. And about the only
9 way that would ever happen if the memory of the hard drive of
10 that computer is filled up with other matter.

11 Now, I guess that the investigators don't see a
12 difference there and from their standpoint maybe there's not,
13 but I think it's as mitigating for this Court to realize that
14 he had deleted these and did not intend to save them whether
15 they were still in the recesses of the computer memory or not.
16 He wasn't intending to trade, sell, distribute, or keep these.
17 And they had been deleted when they were recovered by the
18 computer lab off of that computer.

19 Now, further, Your Honor, this is an extraordinary family
20 situation, and I guess it's possible that the family situation
21 may have contributed to these offenses having occurred. But
22 as you know from reading this report, Mr. Vasiloff's wife is
23 in very poor health. She's been in and out of the hospital a
24 lot and apparently was in the hospital when he was arrested.
25 Now, I understand that she was to be back in the hospital very

1 recently within the last few weeks for more surgery. I don't
2 know the details of that, but you know the family was
3 disintegrating. Mr. Vasiloff apparently quit various
4 employment in order to stay home and take care of his wife and
5 during that time is when these offenses occurred.

6 But again, Judge, I don't think Mr. Vasiloff had any
7 specific criminal intent in taking these pictures to do
8 anything illegal other than take the pictures, of course, and
9 I'm sure if he had realized the criminality of that at the
10 time he was doing it, he would not have done it. But he was
11 not intending to distribute these. He was not intending to
12 sell them. And quite frankly, he can't explain why he did it.
13 And you know I asked him what he was thinking, and he simply
14 replied, you know, I don't guess I was thinking. But you know
15 there are some extraordinary circumstances here, Your Honor,
16 and we would simply call the Court's sentence of what is fair
17 and just when you decide what to do here.

18 Now, in Mr. Vasiloff throwing himself on the mercy of the
19 Court, other than a sentence of fairness, the only thing I can
20 really come up with that might help the Court in this matter
21 is a recent case of U.S. versus McBride from the appeal number
22 if 06-00012, which was decided recently by the 11th Circuit,
23 and I'm sorry, I do not have a more specific cite to that.
24 But in this case, the defendant had been charged with
25 possessing 981 images and 45 separate videos involving child

1 pornography, but also distribution, and the Court in that
2 case, Judge, saw fit to be lenient. The judge's decision was
3 apparently appealed by the United States, but the judge was
4 affirmed, and I think that at least gives a basis for this
5 Court to use some discretion; to see this case for what it
6 really is and to be lenient with Mr. Vasiloff.

7 THE COURT: Do you have a copy of that case?

8 MR. TUTEN: No, Your Honor. I merely have the cite
9 to it, Your Honor. I was not able to retrieve the full cite.

10 THE COURT: All right. Mr. Vasiloff, do you have
11 anything to say before the Court pronounces sentence in this
12 case?

13 THE DEFENDANT: Yes, ma'am. I wrote a statement. I
14 just wish to apologize to this Court and my friends and
15 family, especially my wife and my daughter and my mother for
16 embarrassing them and shaming the family name. And I wanted
17 the Court to know that I did realize that I had done a
18 terrible thing. And being that the computer was hooked up to
19 the internet, I was worried about electronic theft, and that
20 was the reason I deleted that, and what I had done was
21 terrible. I had deleted it from the computer so it wouldn't
22 be stolen and posted on the internet on sites. And if the
23 Court will just give me another chance to make things right,
24 and my family that might forgive me later on.

25 THE COURT: Thank you, Mr. Vasiloff.

1 All right. Does the government have anything it would
2 like to say at this time?

3 MS. BURRELL: Your Honor, we would just like to
4 briefly respond to some of the things that Mr. Tuten said
5 because of the government's version of what happened in this
6 case is greatly different from the things that Mr. Tuten has
7 said. And I have got a witness here that could testify to
8 this. This is special agent Ed Sims of the FBI that
9 investigated the case, and if the Court would indulge me, I
10 would just assume just make a proffer to the Court of what our
11 investigation in this case showed.

12 THE COURT: That's fine.

13 MS. BURRELL: Your Honor, Mr. Tuten began by saying
14 that Mr. Vasiloff was very remorseful for the things that he
15 had done. Mr. Vasiloff might be remorseful now, but he was
16 not remorseful even up until the time that he was questioned
17 by the FBI. Now, Mr. Tuten says that . . .

18 THE COURT: Okay. Why do you say that?

19 MS. BURRELL: I am about to tell you, Your Honor.

20 THE COURT: Okay.

21 MS. BURRELL: Mr. Tuten says that Mr. Vasiloff
22 accepted responsibility even before the police questioned him
23 about that. That is not so, Your Honor. Mr. Vasiloff -- well
24 let me back up. This child was his 14-year-old stepdaughter,
25 but she -- It was really more like a father-daughter

1 relationship in that this was the only father that she had
2 ever known.

3 Your Honor, she was removed from the home at some point
4 because of these allegations, and when she was removed from
5 the home, she told a person who was acting as her foster
6 mother what her stepfather had been doing to her, and she
7 alleged that he had given her a dildo and taught her how to
8 use it; had taken pictures of her; had given her alcoholic
9 beverages. She also alleges that he gave her controlled
10 substances when this was happening and fully disclosed the
11 activities that had been going on in the house. Well, DHR was
12 immediately contacted and a series of court appearances began
13 in an effort to take this child away from the family; to get
14 her somewhere that she would be safe. Well, she was appointed
15 a guardian ad litem, and I had personally spoke to the
16 guardian ad litem, and it was related to me that during these
17 hearings, Mr. Vasiloff would come to the hearings and relate
18 that the child was a habitual liar and said that -- gave a
19 bunch of different reasons about why she had fabricated these
20 stories. He said that she had a mental illness. He said that
21 she had had a physical illness wherein she had gotten a really
22 high fever and it caused her to hallucinate and she had
23 hallucinated these things. He said that she had been taking
24 medication and even produced the medication in court at one
25 point; said that one of the side effects of the medication was

1 that it made her hallucinate and make up things and be a
2 habitual liar. So not only did he sexually abuse this child
3 by taking these horrendous pictures -- Your Honor, I have got
4 the pictures, and I would ask that before you make a decision
5 you look at them so that you know what we're talking about.
6 Not only did he sexually abuse this child by taking these
7 horrendous pictures, he also again abused the child when they
8 would go to court and make these allegations about her lying
9 about these activities and given all of these bizarre reasons
10 about why she was lying. So Your Honor, he didn't accept
11 responsibility until the FBI came and laid the pictures out in
12 front of him and said the child is not lying. We found the
13 pictures. That was the point when he admitted what he had
14 done and began to accept responsibility and probably feel
15 remorse.

16 Your Honor, I will tell you this, when they initially
17 talked to Vasiloff, when the agent initially talked to
18 Vasiloff, until he was confronted and shown the pictures, he
19 continued to admit that the pictures didn't exist. It was not
20 until he was shown the pictures that he broke down and
21 admitted what he had done. So that's the reason, Your Honor,
22 that we say that he didn't accept responsibility until he was
23 confronted with the actual evidence, and that is probably when
24 he began to feel remorse. If he had felt remorse before that,
25 he would have admitted long before this what he had done to

1 this child and not put that child through all the DHR custody
2 hearings and allege that she was, all the things that he had
3 alleged and that she was making this up.

4 Your Honor, we would ask that you take a minute and look
5 at the pictures, please.

6 THE COURT: I am always willing to look at pictures
7 because I think --

8 MS. BURRELL: May I approach?

9 THE COURT: -- because I think both the defendant
10 and the victim deserve my doing that. It's not something I
11 want to do, but I will do it. You may approach.

12 MS. BURRELL: Thank you.

13 MR. TUTEN: May I briefly respond?

14 THE COURT: Mr. Tuten, do you deny that any of these
15 pictures are pictures that were taken from -- have you seen
16 the pictures?

17 MR. TUTEN: Yes, Your Honor, I have, and we do not
18 deny those, Your Honor.

19 THE COURT: Okay. I will let you respond, but I
20 think I will look at the picture first, and then I will let
21 you respond.

22 MR. TUTEN: Yes, ma'am.

23 THE COURT: I don't know that Ms. Burrell was --
24 were you through?

25 MS. BURRELL: I am through, Your Honor. Thank you.

1 THE COURT: Okay.

2 (Pause.)

3 THE COURT: Mr. Tuten, you can respond.

4 MR. TUTEN: Judge, let me first say that if I have
5 misstated any facts, then I humbly apologize to the Court and
6 to the prosecutor, but I believe what I said was that Mr.
7 Vasiloff had deleted these photos long before the federal
8 investigators became involved. And certainly from that point,
9 he did accept responsibility.

10 Now, as far as the DHR case goes, Your Honor, I was not
11 involved in that. Likewise, I have talked to various other
12 attorneys that were involved. It's my understanding that Mr.
13 Vasiloff was not a party to any of those; only being the
14 stepfather of the children that were involved in that. And
15 that there were numerous other issues other than some of the
16 things that may have been the basis for the federal
17 investigation leading to the seizure of these pictures. But
18 other than that, I still stand by what I told you earlier.

19 Oh, one other thing, Your Honor, that Mr. Vasiloff asked
20 me to tell you and that is that this young lady did have viral
21 encephalitis and was in the hospital with that for a number of
22 days during the time of some of this investigation. And I
23 believe she was in the hospital at the time that she made some
24 of the disclosure about the photos.

25 (Long pause.)

1 THE COURT: First of all, there's been no motion for
2 departure, but the Court expressly notes that even without a
3 motion, the Court has the authority to impose the sentence
4 other than that recommended by the advisory guidelines.
5 However, the Court finds no reason to depart from the sentence
6 called for by application of the guidelines inasmuch as the
7 facts found are the kind contemplated by the Sentencing
8 Commission. In the absence of a motion for a departure
9 indicates to me that counsel are in agreement with the fact
10 that the only argument that the defendant is making is that
11 the sentence -- that the guidelines calculation is not
12 reasonable under the facts and circumstances of this case.

13 MR. TUTEN: Yes, Your Honor. That's correct.

14 THE COURT: All right. Now, the way the guideline
15 sentence was determined is based on statutory minimums for
16 Counts 1 through 21 stacked, and then the statutory maximum
17 for Count 22 is also stacked or made to run consecutively.
18 And so you're saying that it's just inappropriate to stack in
19 this case or that that number is just excessive in this case?

20 MR. TUTEN: Your Honor, I think it is under the
21 facts and circumstances of this case and that this particular
22 situation is probably not exactly what those guidelines
23 contemplated when those were initially enacted.

24 THE COURT: But wouldn't you agree with me that I
25 can't go below the statutory -- You are saying I should just

1 impose one statutory minimum or something less than all the
2 statutory minimums?

3 MR. TUTEN: Yes, Your Honor.

4 THE COURT: What you're objecting to is the stacking
5 of the statutory minimums.

6 MR. TUTEN: Yes, Your Honor.

7 THE COURT: All right. I don't see any reason to
8 vary in this case. It is an extraordinarily long sentence.
9 It's 3,900 months is what it comes to, which is 325 years,
10 which is just basically another way of saying life.

11 The fact that Mr. Vasiloff used his position as the
12 stepfather or surrogate father -- and by surrogate father, I
13 mean more than stepfather. There was a close relationship
14 where the child looked on Mr. Vasiloff as the person who had
15 been in the role of her father makes this worst. Although any
16 child should not go through what this child went through, but
17 the fact that Mr. Vasiloff was through all intensive purposes
18 her father makes this worst. The fact that the mother was in
19 the hospital just gave Mr. Vasiloff more access to his
20 stepdaughter without any fear of discovery by his wife.

21 I am sympathetic to the fact that his wife may need him
22 to help take care of her, especially if her leg is amputated,
23 which the presentence report indicates. We don't know whether
24 that's going to happen or not. People do live with
25 amputations, and the only time so far that I have varied based

1 on a family situation is where the defendant was the only
2 caregiver and he had a child who the government conceded would
3 die if the child didn't have around-the-clock care and it was
4 a situation involving unlicensed sale of firearms, which is
5 certainly a serious offense, but the child wasn't, whose life
6 was being saved, was not the victim in the case.

7 Now, I'm aware that the child has been removed from the
8 home and her brother has been removed from the home. So this
9 defendant will have no access assuming he were released to
10 this child unless the maternal great-grandmother is totally
11 nuts.

12 But because of the relationship between Mr. Vasiloff and
13 this particular child, it's not only, you know, the production
14 of child pornography or sexual exploitation of a child, but
15 it's sexual exploitation of a child who in everything but a
16 biological sense was the daughter of the perpetrator, and so
17 it's incestuous type. Well, although I guess technically
18 incest. It's just that type of violation. And the level
19 of -- I mean, I am not a psychologist or psychiatrist, but the
20 level of the impact on the victim, in my experience with these
21 cases coming before me, is exacerbated when there is an
22 incestuous type exploitation. It's extreme in every case.
23 But it seems in my admittedly short experiences exacerbated
24 when it's an incestuous type.

25 So, now I do note that the photographs were taken within

1 a relatively short period of time; two months, I think, sixty
2 days. So it's not like a case which I have had where there
3 was sexual exploitation of children that went on until each
4 child, you know, from a very early age, as early as three
5 until each child turned about ten, then the next younger
6 sibling would become the victim.

7 So I have considered the fact that it was over a short
8 period of time, and that may lessen the damage to the
9 stepdaughter. I hope. I hope so. I would assume that a
10 shorter period of time would be easier to recover from than
11 years of abuse and exploitation. But he didn't just take
12 pictures of his stepdaughter, he got her to perform sex acts,
13 and they weren't sex acts on him or with him; they were with a
14 dildo. So I have considered that. Therefore, I am not going
15 to vary. And pursuant to the Sentencing Reform Act of 1984,
16 it is the judgment of the Court that the defendant, Gary
17 Steven Vasiloff, is hereby committed to custody of the Bureau
18 of Prisons to be in prison for a term of 360 months for Counts
19 1 through 21, each count, separately, and 120 months as to
20 Count 22 separately with each count to be served consecutively
21 to the other. The total sentence imposed is 3,900 months
22 pursuant to the U.S. Sentencing Guidelines Section 5G1.2(b).
23 The reason I am imposing the sentence is all the reasons I
24 gave that I am not varying, plus -- Well, it's all the reasons
25 that I am not varying.

1 (Pause.)

2 THE COURT: All right. The probation office has
3 just pointed out to me that I did the math wrong because what
4 I am imposing is the statutory minimum as to Counts 1 through
5 21, and the statutory maximum as to Count 22, and that the end
6 result is 3,900 months. So that's 180 months, which is the
7 statutory minimum as to Counts 1 through 21 separately and 120
8 months as to Count 22, which is the statutory maximum
9 separately with each count to be served consecutively to the
10 other. Total sentence imposed is 3,900 months. So I am not
11 changing the total. I am just, I misstated how I got to the
12 total.

13 Count 23 is a forfeiture count which needs to be
14 addressed. We kind of brought it up in the beginning. Mr.
15 Tuten, I think you said that your client knows about the
16 forfeiture order and has no objection to it becoming final.

17 MR. TUTEN: That's correct, Your Honor. Yes, ma'am.

18 THE COURT: All right. The forfeiture order is
19 final. Having considered the guideline computations and
20 having taken them under advisement, the Court finds that the
21 sentence imposed is sufficient but not greater than necessary
22 to comply with the statutory purposes of sentencing.
23 Furthermore, the sentence is reasonable when considering the
24 following sentencing factors found at 18 U.S.C. 3553(a), the
25 nature and circumstances of the offense -- and I have talked

1 about that in terms of, well, I may not have specifically
2 mentioned that the child was 14 at the time, but I considered
3 that; her relationship with Mr. Vasiloff. I also considered
4 the fact that Mr. Vasiloff doesn't have any real prior
5 criminal history. I also considered the fact that the sexual
6 exploitation involved causing the child to perform sex acts on
7 herself, specifically, to penetrate herself with a dildo, in
8 addition to the photographing of her. To reflect the
9 seriousness of the offense; to promote respect for the law;
10 and to provide just punishment for the offense; sexual
11 exploitation of children -- the avoidance of that, the
12 prohibition of that, and therefore the punishment of that to
13 deter it by others -- certainly Mr. Vasiloff is not going to
14 have an opportunity to do it again -- is about as important as
15 the core value as I think this country has. And so the
16 offense is extremely serious, and it's reflected in the
17 sentence, and I think that the sentence does provide just
18 punishment for the offense under all the facts and
19 circumstances of this case.

20 As I said, Mr. Tuten, I know that you felt like these
21 were mitigating factors. I really felt like they were
22 exacerbating factors. I have also considered the need to
23 promote respect for the law, but given Mr. Vasiloff's prior
24 history, I don't think he is a person who, you know, is just
25 routinely disrespectful of the law. I have considered the

1 need to avoid adequate deterrence to criminal conduct by
2 others. Certainly, a lower sentence of at least 50 years
3 would have protected the public from further crimes of this
4 defendant given his age, but this sentence also will
5 accomplish that goal. I have considered the need to avoid
6 unwarranted sentence disparities among defendants.
7 Restitution is not an issue. I am not imposing a fine due to
8 the defendant's inability to pay. It is further ordered that
9 the defendant shall pay the United States a special assessment
10 of \$2,200. The assessment fee is due immediately.

11 If defendant is released from imprisonment, the defendant
12 shall be placed on supervised release for a term of life.
13 While on supervised release, the defendant shall comply with
14 the standard conditions of supervised release of record in
15 this court and the following special conditions. Due to the
16 information contained in the mental health section of the
17 presentence report, the defendant shall participate in a
18 mental health program under the administrative supervision of
19 the probation officer. The defendant shall contribute to the
20 cost of mental health treatment unless the probation officer
21 determines that the defendant does not have the ability to do
22 so.

23 Due to the nature of the offenses, the following six
24 conditions are also imposed while on supervised release: The
25 defendant shall participate under the administrative

1 supervision of the probation officer and the probation
2 officer's computer restriction monitoring program or
3 comparable program in the district of supervision. The
4 defendant shall not have any unsupervised one-to-one contact
5 with any children under the age of 18 other than his own
6 children. The defendant shall not engage in the occupation,
7 employment, or voluntary activities which would place him in a
8 position of trust of children under the age of 18. The
9 defendant shall register and comply with all community
10 notification and requirements and any then applicable local,
11 state, or federal laws to monitoring of those victim
12 sexually-related offenses. The defendant shall allow the
13 probation officer access to photographs and/or video
14 recordings he may possess. The defendant, being a felon and
15 being required to register with the sex offender registration
16 notification act, shall suspend its person and any property,
17 house, residence, vehicle, papers, computers, or other
18 electronic communications, other storage devices or media and
19 effects to search any time with or without a warrant by any
20 law enforcement or probation officer with reasonable suspicion
21 concerning a violation of a condition of supervised release or
22 unlawful conduct by the person and by any probation officer in
23 the lawful discharge of the office's supervision or function.
24 The defendant shall participate in an approved mental health
25 treatment program specializing in sex offender treatment under

1 the administrative supervision of the probation officer. This
2 program may include a psychosexual evaluation, family approved
3 and/or individual counseling, and psychological and clinical
4 polygraph testing. Results of the polygraph examinations may
5 not be used as evidence in court for the purpose of revocation
6 of supervision that may be considered in the hearing to modify
7 conditions of release. While participating in treatment, the
8 defendant shall abide by all rules and requirements of the
9 program. The defendant shall contribute to the cost of
10 treatment and polygraph testing unless the probation officer
11 determines that the defendant does not have the ability to do
12 so.

13 Is there any objection from any party as to the findings
14 of fact, the calculations, the sentence, or the manner in
15 which the sentence was pronounced or imposed other than those
16 previously stated for the record?

17 MS. BURRELL: None from the government, Your Honor.

18 MR. TUTEN: None other than previously stated, Your
19 Honor.

20 THE COURT: All right. Mr. Vasiloff, you have the
21 right to appeal the sentence imposed within ten days if you
22 believe that the sentence is in violation of the law.
23 However, you did enter into a plea agreement that contains a
24 waiver of some or all of your rights to appeal the conviction
25 and sentence and to appeal collaterally. The type of waiver

1 that is in your plea agreement is generally enforceable.
2 However, if you believe that the particular waiver in your
3 plea agreement is unenforceable, you can appeal and present
4 that theory to the appellate court. With a few exceptions,
5 any notice of appeal must be filed within ten days of judgment
6 being entered in your case. If you are unable to pay the
7 costs, you may apply for leave to appeal in forma pauperis and
8 for the appointment of counsel. If you are allowed by the
9 Court to proceed on appeal in forma pauperis, upon your
10 request, the Clerk of Court will assist you in preparing and
11 filing a notice of appeal.

12 Are there any requests regarding recommendations to the
13 Bureau of Prisons? Typical requests might include being sent
14 to a facility where he could get counseling regarding sexual
15 offenses. Another typical request might be that he be
16 incarcerated at the appropriate facility closest to the place
17 where his wife resides so that he won't lose all contact with
18 his wife.

19 MR. TUTEN: Judge, he certainly would appreciate
20 being in facilities close to home. I sort of thought that was
21 generally a given, but he certainly would ask for that, and he
22 will certainly avail himself of any available programs or
23 other such things that may be available to him at any present
24 facility where he is.

25 THE COURT: I think there's only two in the country

1 that have sex offender treatment programs, and I don't know if
2 he would qualify, and they are not in Alabama. And the reason
3 I don't know whether he would qualify is because his sentence
4 is so lengthy, and there's a need for these programs, and they
5 might give priority. I don't think they might give priority
6 of when they are going to be released. The other thing, it
7 would take him out of Alabama to do that. So if I were him, I
8 would prefer to be closest to his wife given the length of his
9 sentence.

10 MR. TUTEN: Yes, Your Honor.

11 THE COURT: I'm sorry. Where does your wife reside?

12 THE DEFENDANT: Leesburg, Cherokee County.

13 THE COURT: I am aware that your wife will suffer
14 from your being not with her when she has these medical
15 conditions, but I find that often the family, almost always
16 the family, and not just your stepdaughter, is a victim of any
17 crime that the person chooses to commit. But I just want you
18 to know that I do regret the fact that her life is going to be
19 harder because of what you did. I do regret that.

20 The defendant is remanded to the custody of the United
21 States Marshal.

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U.S. DISTRICT COURT
N.D. OF ALABAMA

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IN THE UNITED STATES COURT OF APPEALS

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FOR THE ELEVENTH CIRCUIT
U.S. DISTRICT COURT
N.D. OF ALABAMA

08-10412-EE

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

AUG 07 2008

THOMAS K. KAHN
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GARY STEVEN VASILOFF,

Defendant-Appellant.

On Appeal from the United States District Court for the
Northern District of Alabama

BEFORE: ANDERSON, HULL and HILL, Circuit Judges

BY THE COURT:

The Government's motion to dismiss this appeal based on the valid and enforceable sentence appeal waiver in Appellant's plea agreement is GRANTED.

A True Copy
Attested:
Clerk U.S. Court of Appeals, Eleventh Circuit
By: Andrew L. Kere
Deputy Clerk Atlanta, Ga

United States Court of Appeals

Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

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August 07, 2008

Sharon Harris
Clerk, U.S. District Court
1729 5TH AVE N STE 140
BIRMINGHAM AL 35203-2050

Appeal Number: 08-10412-EE
Case Style: USA v. Gary Steven Vasiloff
District Court Number: 07-00337 CR-4-VEH-PWG

RECEIVED
08 AUG - 8 PM 2:33
U.S. DISTRICT COURT
N.D. OF ALABAMA

The enclosed certified copy of this Court's Order of Dismissal is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

The district court clerk is requested to acknowledge receipt on the copy of this letter enclosed to the clerk.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Andrea Ware (404) 335-6218

Encl.

Sharon Harris
Clerk, U.S. District Court
1729 5TH AVE N STE 140
BIRMINGHAM AL 35203-2050

August 07, 2008

Appeal Number: 08-10412-EE
Case Style: USA v. Gary Steven Vasiloff
District Court Number: 07-00337 CR-4-VEH-PWG

TO: Sharon Harris

CC: Robert B. Tuten

CC: Ramona C. Albin

CC: Joyce White Vance

CC: Administrative File

CC: Administrative File

4:10-cv-08001-VEH-SGC

1

CV-10-HS-8001-M

Page 2

4 B 9 25
MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY

U.S. DISTRICT COURT		District N. D. ALABAMA, Mid. Div.	
Name (under which you were convicted) Gary Steven Vasiloff		Docket or Case No.:	
Place of Confinement: USP-TUCSON, ARIZONA		Prisoner No.: 26486-001	
UNITED STATES OF AMERICA		Movant (include name under which you were convicted)	
		v. Gary Steven Vasiloff	

MOTION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: Northern District of Alabama, Middle Division, Hugo L. Black Courthouse
1729 Fifth Avenue North, Birmingham, AL 35203
- (b) Criminal docket or case number (if you know): 4:07-cr-337-VEJ-PWG
2. (a) Date of the judgment of conviction (if you know): January 17, 2008
- (b) Date of sentencing: January 16, 2008
3. Length of sentence: 3,900 Months
4. Nature of crime (all counts):
 - 1) Sexual Exploitation of a Minor 18 U.S.C. §2251(a) (counts 1-21)
 - 2) Possession of Child Pornography 18 U.S.C. §2252A(a)(5)(B) (count 22)
 - 3) Criminal Forfeiture 18 U.S.C. §2253 (count 23)
5. (a) What was your plea? (Check one)
 (1) Not guilty ☐ (2) Guilty ☒ (3) Nolo contendere (no contest) ☐
 (b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to? N/A
6. If you went to trial, what kind of trial did you have? (Check one) Jury ☐ Judge only ☐ N/A

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☐ No ☒
8. Did you appeal from the judgment of conviction? Yes ☒ No ☐
9. If you did appeal, answer the following:

(a) Name of court: United States Court of Appeals, Eleventh Circuit

(b) Docket or case number (if you know): 08-10412-EE

(c) Result: Appeal dismissed.

(d) Date of result (if you know): August 7, 2008

(e) Citation to the case (if you know): _____

(f) Grounds raised: _____

- 1) Sentence was far outside the sentencing guideline range.
- 2) Court of Appeals is required to review sentence to determine reasonableness.
- 3) Sentencing Court did not consider alternative (kinds of) sentences available.

- (g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☒ No ☐

If "Yes," answer the following:

(1) Docket or case number (if you know): 08-7623

(2) Result: Certiorari denied

(3) Date of result (if you know): January 12, 2009

(4) Citation to the case (if you know): 129 S. Ct. 966, 173 L.Ed. 2d 156

(5) Grounds raised: _____

- 1) Is an appeal waiver valid when the plea contract is void due to lack of benefit/consideration, i.e. a reasonable sentence. Because same sentence could have been received with a blind plea.
- 2) Resolve the circuit split where appeal waivers preclude I.A.C. Claims, especially those involving the plea agreement.

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?

Yes ☐ No ☒

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

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(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☐ No ☐

(7) Result: _____

(8) Date of result (if you know): _____

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☐ No ☐

(7) Result: _____

(8) Date of result (if you know): _____

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☐

(2) Second petition: Yes ☐ No ☐

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(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not: _____

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE: Ineffective assistance of counsel ["IAC"] in negotiating an appeal waiver without securing a true/actual benefit.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):
Recommended sentence in this case was "LIFE" (and the actual sentence was many multiples of any human's lifespan). All facts and guidelines used to derive this recommendation were well-known prior to the appeals waiver being signed, yet both attorneys let me sign it-- knowing my sentence would far exceed my lifetime. A "blind plea" (with no appeals waiver) would not have resulted in an EFFECTIVELY worse situation and would have offered the benefit of a review on appeal of both the sentence and the conviction.

(b) Direct Appeal of Ground One:

- (1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: IAC not usually brought up on direct appeal. Attorney did not raise issue in the direct appeal.

(c) Post-Conviction Proceedings:

- (1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

GROUND TWO: Compulsion, by ineffective counsel, with knowing complicity of other parties, to waive all my constitutional rights, (based on an unrealistic, unspoken promise.)

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim):

Any rational person -- if aware that the sentence would effectively be the same (i.e. life in prison) -- would take a case to trial (or at least actively contest the sentence). I was unaware that all parties believed, at the time I signed the plea bargain, that "life" was the appropriate sentence IN THIS CASE. If this was explicitly explained, I would not have pled guilty -- or at least would not have waived my appeal rights.

(b) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: IAC not usually
brought up on direct appeal. Attorney did not raise issue
in the direct appeal.

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

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(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

GROUND THREE: Ineffective counsel never requested proof of the USPO-asserted "production dates" used to "group" the offense resulting in an incorrect sentencing enhancement (and inappropriately compelled me to waive this issue).

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

As an unsophisticated prisoner I was able to request proof of the "production dates" of the various charged photos and learned neither the FBI nor the US Attorney had any. A layman's analysis of the photos suggests that the alleged groupings are unreasonable. If the grouping evidence was challenged, then all the photos would be placed in a single (U.S.S.G. §3D1.1) group -- removing the four point §3D1.4 enhancement.

(b) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: IAC not usually brought up on direct appeal. Attorney did not raise issue in the direct appeal.

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

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Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

GROUND FOUR: Ineffective counsel never requested proof of "multiple photo shoot dates" -- and compelled me to waive this argument -- resulting in an inappropriate five-level sentence enhancement, for pattern of conduct.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The U.S.S.G. §2G2.2(b)(5) "pattern of conduct" enhancement would NOT be applied in this case if there was only one "group" (see, Ground Three). Therefore a direct consequence of my attorney's failing to document or argue that the government could not prove the photos were taken on multiple days this enhancement. An effective attorney would have won this argument.

(b) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: IAC not usually
brought up on direct appeal. Attorney did not raise issue in
direct appeal.

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

GROUND FIVE:

The "providing alcohol to a minor making them vulnerable" enhancement [3A1.1(b)(1)] argument only succeeded because of IAC who then improperly compelled me to waive the argument.

FACTS:

In this Circuit, the Appeals Court and others have ruled that providing alcohol to a minor who then fully undresses in public, for video and print recordings, is NOT a crime. In this case, there is no evidence the liquid in the beer bottle was alcohol -- it easily could have been a "prop", like in the movies. Also, if similar photos were willingly posed for before (groups one and two) and after (group five) the alleged provision/consumption of alcohol (group three and four), then clearly the alcohol did not induce or contribute to the performance -- making the enhancement improper -- something any reasonable attorney would challenge.

GROUND SIX:

It is multiplicitous -- causing this Court to lose jurisdiction -- when more than one "production" count is charged for a single "photo-shoot". (Also IAC not to argue/appeal this fact).

FACTS:

Whether, as the government contends (without presenting evidence) that there were multiple photo-shoots or as Petitioner claims that there was but one, it is undisputed

that Petitioner was charged and allowed to plead to multiple counts for production (18 U.S.C. 2251(a)) for an incident that occurred at a single photo-shoot. The fact that the trial (and appeals) attorneys never questioned or disputed this fact deprived me of my right to (effective assistance of) counsel as an attorney should have disputed this Court's lack of jurisdiction on multiplicitous counts -- which resulted in a higher prison sentence (and a larger Special Assessment).

GROUND SEVEN:

Constitutional and legal errors render this conviction invalid.

FACTS:

A review of the facts in this case show the conviction was unlawful in light of prevailing law and/or the Constitution.

GROUND EIGHT:

Constitutional and legal errors render this sentence invalid.

FACTS:

A review of facts in this case show the guideline calculation and/or sentence was unlawful in light of prevailing law and/or the Constitution.

GROUND NINE:

Cumulative Error causes the conviction and/or sentence to be invalid.

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FACTS:

Taken as a whole, even if any of the errors individually are not sufficient to overturn the conviction and/or sentence, together, the errors are sufficient to warrant granting of this Motion.

GROUND TEN:

My Constitutional right to "due process" and freedom from "cruel and unusual punishment" was violated by my lengthy sentence.

FACTS:

Persons sentenced for much "worse" crimes (in this Circuit and across the U.S.) received much lower sentences, making my sentence unreasonable. Also, I was made to plead to a much greater and severe number of crimes (increasing my sentence) than many other defendants with similar or worse facts in their case.

GROUND ELEVEN:

Offense level 43 (or 44) should NOT be "mandatory Life" but instead should be a "range" (as are levels 1-42 at Criminal History I).

FACTS:

Chief USDC Judge Roettger (in this Circuit), and a self-proclaimed "hanging Judge", has stated (and supported his argument) in published rulings that Levels above 42 (Criminal

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History I) should have "sentencing ranges" as do those of 42 and below. He lists the ranges and if I was sentenced in that fashion, my sentence would be SUBSTANTIALLY less. Therefore, his principles should have been considered by this Court at my sentencing. One cause of the failure to consider them is IAC, which produced the prejudice of them not being brought to this Court's attention or considered.

GROUND TWELVE:

"Appeal Waiver" (if not plea agreement itself) should be invalidated due to contract principles of "Lack of consideration" or "Mutual Mistake".

FACTS:

As calculated in the PSIR (and unchallenged by either defense counsel or the government) the expected Offense Level was 44, yielding a mandatory "LIFE" sentence. If the government knew this when negotiating the plea agreement -- and associated "appeals waiver"-- then because Defendant reaps no BENEFIT (i.e. with or without the agreement the Defendant would get "life", the only difference being that WITH the agreement he would also lose his Constitutional and legal appeals rights) the agreement -- or at least the "appeals waiver" -- should be abrogated for lack of consideration (as contract law applies in this situation). If both parties were UNAWARE of the "expected" LIFE sentence, then due to the contract principle of "mutual mistake" the plea agreement -- or at least the "appeals waiver" -- should be abrogated.

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(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: I.A.C. not normally presented on direct appeal.

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes ☐ No ☒
If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. _____

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: Mr. Robert B. Tuten
TUTEN LAW OFFICES, 223 East Side Square, Huntsville, AL 35801

(b) At arraignment and plea: SAME

(c) At trial: SAME

(d) At sentencing: SAME

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(e) On appeal: SAME --Robert B. Tuten and Mickey J. Gentle
917F Merchants Walk, Huntsville, AL 35801

(f) In any post-conviction proceeding: N/A

(g) On appeal from any ruling against you in a post-conviction proceeding: N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: _____

(b) Give the date the other sentence was imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐ N/A

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion. * N/A

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

- (1) the date on which the judgment of conviction became final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

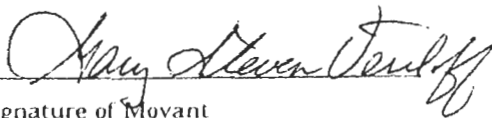
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Therefore, movant asks that the Court grant the following relief: Grant Petitioner's
waiver/nullification of his "appeal waiver" and/or vacate his conviction
(for proper re-sentencing)[and any and all additional relief to which
he is entitled.]
or any other relief to which movant may be entitled

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct
and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on January
11, 2010 (month, date, year).

Executed (signed) on January 11, 2010(date).


Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not
signing this motion. _____

IN FORMA PAUPERIS DECLARATION

{Insert appropriate court}

6

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

MIDDLE DIVISION

GARY STEVEN VASILOFF)
)
) 4:10-CV-8001-VEH-PWG
) (4:07-CR-0337-VEH-PWG)
v.)
UNITED STATES OF AMERICA)

MOTION TO DISMISS §2255 MOTION

Comes now the United States by and through Joyce White Vance, United States Attorney, and Mary Stuart Burrell, Assistant United States Attorney and respectfully requests that the Court dismiss the pending “Motion Under 28 U.S.C. §2255” in this matter. In support of its motion, the United States refers the Court to Vasiloff’s plea agreement with the United States (Attachment A) and the transcript of the colloquy at his change of plea hearing (Attachment B), in which the district judge confirmed Vasiloff’s understanding of and agreement to the waiver provision of the plea agreement.

The plea agreement, in a provision labeled “Waiver of Right to Appeal and Post-Conviction Relief,” provided that:

WAIVER OF RIGHT TO APPEAL AND POST-CONVICTION RELIEF:

As a term and condition of this Plea Agreement I, GARY STEVEN VASILOFF, hereby waive my right to appeal my conviction in this case, any fines, restitution, and/or sentence (including one for revocation of release) that the court might impose upon me, and the right to challenge any sentence so imposed or the manner in which the sentence was determined in any collateral attack, including, but not limited to, a motion brought under 28 U.S.C. § 2255, subject to the following limitations:

The defendant reserves the right to contest in an appeal or post-conviction proceeding:

- (a) Any sentence imposed in excess of the applicable statutory maximum sentence(s).

The defendant acknowledges that before giving up these rights, he discussed the Federal Sentencing Guidelines and their application to his case with his attorney, who explained them to his satisfaction. The defendant further acknowledges and understands that the government retains its right to appeal where authorized by statute.

I, GARY STEVEN VASILOFF, hereby place my signature on the line directly below to signify that I fully understand the foregoing paragraphs, and

that I am knowingly and voluntarily entering into this waiver.

GARY STEVEN VASILOFF

(Attachment A at pg. 5-6). Vasiloff signed his name on the line labeled with his name indicating that he understood the above provision.

At the change of plea hearing, the court discussed the waiver provision with Vasiloff. The following occurred:

THE COURT: Mr. Vasiloff, does the written plea agreement that is on the table in front of you contain everything that you are relying on at this time by way of a plea bargain or plea agreement?

THE DEFENDANT: Yes, ma'am.

THE COURT: Before you signed the agreement, did you have a sufficient opportunity to review it with your attorney, Mr. Tuten?

THE DEFENDANT: Yes, ma'am.

THE COURT: Did you have any questions of Mr. Tuten regarding the meaning of the agreement or how it might operate that he did not answer to your satisfaction?

THE DEFENDANT: No, ma'am, he answered all of my questions.

THE COURT: Mr. Vasiloff, the plea agreement that you have entered contains language waiving some or all of your rights to plea agreement the sentence to be imposed. Under certain circumstances, the defendant can waive his or her right to appeal, and that type of waiver may be enforceable. However, if you believe that the waiver that is in your plea agreement is not enforceable, you can appeal the sentence and present that theory to the appellate court.

When you signed the plea agreement, did you understand that you were giving up some or all of your rights to appeal?

THE DEFENDANT: Yes, ma'am.

(Attachment B at pg. 9-10).

A §2255 motion waiver provision is enforceable if the waiver is made knowingly and voluntarily. *United States v. Bushert*, 997 F.2d 1343, 1350-51 (11th Cir. 1993). To establish the waiver's validity, the United States must show either that (1) the district court specifically questioned the defendant about the provision during the plea colloquy, or (2) it is manifestly clear from the record that the defendant fully

understood the significance of the waiver. *United States v. Weaver*, 275 F.3d 1320, 1333 (11th Cir. 2001); *Bushert*, 997 F.2d at 1350-51.

The court satisfied the first condition in *Bushert* in this case, in compliance with the procedure set forth in *United States v. Buchanan*, 131 F.3d 1005, 1008-1009 (11th Cir. 1997). Vasiloff clearly evidenced a knowing and voluntary intent to enter into the waiver agreement as a part of his plea bargain.

The plea agreement and the transcript of the plea hearing are also sufficient to establish the second option under *Bushert*--that it is manifestly clear from the record that Vasiloff understood the significance of the waiver. As stated above, the waiver provision in the plea agreement has an internal signature provision that Vasiloff signed. He attested that he understood the appeal waiver provision and that he knowingly and voluntarily waived his appeal rights. Vasiloff also stated at the plea hearing that he understood he was giving up some or all of his appeal rights. Additionally, Vasiloff's counsel, Robert Tuten, stated that he fully discussed the plea agreement with Vasiloff at length prior to Vasiloff signing the agreement. (Attachment B at pg. 8).

The record in Attachment B reflects that the underlying plea of guilty was entered into knowingly and voluntarily as well. The district court conducted a thorough Rule 11 colloquy. The record shows that Vasiloff was aware of the charges

against him and the consequences of his plea. Defense counsel stated he was satisfied that Vasiloff knowingly and voluntarily entered his plea of guilty. (Attachment B at pg. 22). And, the court found that Vasiloff's plea of guilty was knowing and voluntary. (Attachment B at pg. 29).

Vasiloff, who was convicted of 21 Counts of Production of Child Pornography and a single count of Possession of Child Pornography, raises eleven issues in his §2255 motion, all of which were waived. This §2255 motion falls within the waiver Vasiloff agreed to in his plea agreement. Knowing and voluntary waivers that fall within the ambit of the contractual agreement between the United States and a defendant, such as this one, have been repeatedly enforced by the Eleventh Circuit Court of Appeals. *See, e.g. United States v. Pease*, 240 F.3d 938, 942 (11th Cir. 2001); *United States v. Benitez-Zapata*, 131 F.3d 1444, 1446 (11th Cir. 1997).

Indeed, the Eleventh Circuit Court of Appeals has enforced the waiver Vasiloff agreed to in his plea agreement when Vasiloff attempted a direct appeal in his case following the entry of judgment against him. The Court of Appeals rejected the appeal based upon its determination that there was "a valid and enforceable. . . appeal waiver contained in [Vasiloff's] plea agreement . . ." Order dismissing appeal dated August 7, 2008 (Attachment C). Similarly, because the written plea agreement also included a waiver of Vasiloff's "right to challenge any conviction or sentence

[pursuant to] 28 U.S.C. § 2255,” the current petition should be dismissed.

To put it another way, just as the Court of Appeals first resolved the validity of the appeal waiver before considering the merits of the issue raised on appeal, this Court should first resolve the validity of the §2255 waiver before considering the merits of Vasiloff’s petition. *See, e.g., United States v. Howle*, 166 F.3d 1166, 1169 (11th Cir. 1999) (“honor[ing the plea] agreement” – and the waiver of the right to appeal included within that agreement – “by not reaching the merits of [the] appeal”); *Buchanan*, 131 F.3d at 1008; *Pease*, 240 F.3d at 942. The United States respectfully requests that the §2255 motion in this case be dismissed, Vasiloff having knowingly and voluntarily waived his right to appeal in his plea agreement with the United States.

In the event the Court denies this Motion, the United States requests that it be granted sufficient additional time to respond to the substantive issues raised by Vasiloff in his §2255 motion.

Respectfully submitted this the 1st day of April, 2010.

JOYCE WHITE VANCE
United States Attorney

Mary Stuart Burrell

MARY STUART BURRELL
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and served a copy on the defendant by placing a copy of the same in the United States Mail, first class postage prepaid, this the 1st day of April, 2010.

Gary Steven Vasiloff
Reg. No. 26486-001
USP-Tucson
P.O. Box 24550
Tucson, AZ 85734

Mary Stuart Burrell
MARY STUART BURRELL
Assistant United States Attorney

FILED

OCT 18 2007

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

MIDDLE DIVISION

UNITED STATES OF AMERICA

v.

GARY STEVEN VASILOFF

)
)
)
)
)

4:07-CR-0337-VEH-PWG

PLEA AGREEMENT

The United States of America and defendant GARY STEVEN VASILOFF
hereby acknowledge the following plea agreement in this case:

PLEA

The defendant agrees to plead guilty to **COUNTS ONE through TWENTY-TWO** and confess **COUNT TWENTY-THREE** of the Indictment filed in the above numbered and captioned matter. In exchange, the United States Attorney, acting on behalf of the United States and through the undersigned Assistant United States Attorney, agrees to recommend the disposition specified below.

TERMS OF THE AGREEMENT

I. MAXIMUM PUNISHMENT:

The Parties understand that the maximum statutory punishment that may be imposed for the crime of Production of Child Pornography, in violation of Title 18, United States Code, Section 2251(a), as charged in COUNTS ONE through TWENTY-ONE, is:

- a. Imprisonment for not less than 15 years nor more than 30 years;
- b. A fine of not more than \$250,000, or,
- c. Both (a and b);
- d. Supervised release for not less than 5 years nor more than life; and
- e. Special Assessment Fee of \$100 per count.

The Parties understand that the maximum statutory punishment that may be imposed for the crime of Possession of Child Pornography, in violation of Title 18, United States Code, Section 2252A(a)(5)(B), as charged in COUNT TWENTY-TWO, is:

- a. Imprisonment for not more than 10 years;
- b. A fine of not more than \$250,000, or,
- c. Both (a and b);
- d. Supervised release for not less than 5 years nor more than life; and
- e. Special Assessment Fee of \$100 per count.

II. FACTUAL BASIS FOR PLEA:

The defendant hereby stipulates to the accuracy of the following information:

The Alabama Department of Human Resources Assessment of Children at Risk officials received information and reported the same to the Cherokee County Sheriff's Office (CCSO), advising that Gary Steven Vasiloff had taken nude photographs of his stepdaughter (age 14) using a dildo and posing in other lewd and lascivious positions, and had downloaded the photos from his digital camera onto his personal computer. It was also alleged that the victim had been given alcoholic beverages before the pictures were taken.

On January 23, 2007, the CCSO executed a state search warrant at Vasiloff's residence. Vasiloff's computer was seized, along with other items of evidence, including a digital camera and a dildo. The CCSO utilized the computer analysis services of the Alabama Computer Forensic Lab to analyze Vasiloff's computer. Vasiloff's computer was analyzed and twenty-one images of child pornography depicting the victim were discovered. Seven additional images of the victim depicting breast nudity were also discovered. In numerous of these pictures, the victim can be seen consuming alcoholic beverages she says were given to her by Vasiloff. The images were produced by a Concord camera, which was manufactured in the People's Republic of

China.

The FBI initiated its investigation into the matter after receiving investigative reports from the CCSO on July 17, 2007. On July 31, 2007, an examiner with the Alabama Computer Forensic Lab provided the FBI with a report of examination of Vasiloff's personal computer. The FBI reviewed the report on July 31, 2007, and confirmed that the images of child pornography were in fact of the victim in question.

On August 8, 2007, Vasiloff was arrested on a federal complaint charging him with Possession of Child Pornography. After waiving his rights pursuant to Miranda, he confessed to producing the images of child pornography depicting his step-daughter. He admitted that the images had been taken at a deceased relative's abandoned house in Cherokee County, Alabama, between the dates of June 23, 2006, and August 14, 2006. He also turned over the Concord camera used to produce the images.

III. RECOMMENDED SENTENCE:

Pursuant to Rule 11(c)(1)(B), Fed.R.Crim.P., the government will recommend the following disposition:

- (a) That the defendant be sentenced within the advisory guideline range as that range is determined by the Court on the date sentence

is pronounced;

(b) In calculating the advisory guideline range, the United States will recommend that the defendant receive the maximum credit for acceptance of responsibility for which he is eligible pursuant to U.S.S.G. § 3E1.1.

(c) That the defendant pay a special assessment fee of \$2200, said amount due and owing as of the date sentence is pronounced.

IV. WAIVER OF RIGHT TO APPEAL AND POST-CONVICTION RELIEF:


As a term and condition of this Plea Agreement I, GARY STEVEN VASILOFF, hereby waive my right to appeal my conviction in this case, any fines, restitution, and/or sentence (including one for revocation of release) that the court might impose upon me, and the right to challenge any sentence so imposed or the manner in which the sentence was determined in any collateral attack, including, but not limited to, a motion brought under 28 U.S.C. § 2255, subject to the following limitations:

The defendant reserves the right to contest in an appeal or post-conviction proceeding:

(a) Any sentence imposed in excess of the applicable statutory maximum sentence(s).

The defendant acknowledges that before giving up these rights, he discussed the Federal Sentencing Guidelines and their application to his case with his attorney, who explained them to his satisfaction. The defendant further acknowledges and understands that the government retains its right to appeal where authorized by statute.

I, GARY STEVEN VASILOFF, hereby place my signature on the line directly below to signify that I fully understand the foregoing paragraphs, and that I am knowingly and voluntarily entering into this waiver.


GARY STEVEN VASILOFF

V. UNITED STATES SENTENCING GUIDELINES:

Counsel has explained to the defendant, that in light of the United States Supreme Court's recent decision in United States v. Booker, 125 S.Ct. 738 (2005), the federal sentencing guidelines are **advisory** in nature. Sentencing is in the court's discretion and is no longer required to be within the guideline range. The defendant agrees that, pursuant to this agreement, the court may use facts it finds by a preponderance of the evidence to reach an advisory guideline range and defendant explicitly waives any right to have those facts found by a jury beyond a reasonable doubt.

VI. AGREEMENT NOT BINDING ON COURT:

The Parties fully and completely understand and agree that it is the Court's duty to impose sentence upon the defendant and that any sentence recommended by the government is **NOT BINDING UPON THE COURT**, and that the Court need not accept the government's recommendation. Further, the defendant understands that if the Court does not accept the government's recommendation, he does not have the right to withdraw his plea.

VII. VOIDING OF AGREEMENT:

The defendant understands that should he (a) violate any federal, state, or local law after entering into this Plea Agreement, (b) move the Court to accept his plea of guilty in accordance with, or pursuant to, the provisions of North Carolina v. Alford, 400 U.S. 25 (1970), or (c) tender a plea of *nolo contendere* to the charges, the agreement will become NULL and VOID, and the United States will not be bound by any of the terms, conditions, or recommendations, express or implied, which are contained therein.

VIII. OTHER DISTRICTS AND JURISDICTIONS:

The parties understand and agree that this agreement **DOES NOT BIND** any other United States Attorney in any other district, or any other state or local authority.

IX. TAX, FORFEITURE AND OTHER CIVIL/ADMINISTRATIVE PROCEEDINGS:

Unless otherwise specified herein, the parties understand and acknowledge that this agreement does not apply to or in any way limit any pending or prospective proceedings related to defendant's **tax liabilities**, if any, or to any pending or prospective **forfeiture** or other **civil** or **administrative** proceedings.

X. DEFENDANT'S UNDERSTANDING:

I have read and understand the provisions of this agreement consisting of eleven (11) pages. I have discussed the case and my constitutional and other rights with my lawyer. I am satisfied with my lawyer's representation in this case. I understand that by pleading guilty, I will be waiving and giving up my right to continue to plead not guilty, to a trial by jury, to the assistance of counsel at that trial, to confront, cross-examine, or compel the attendance of witnesses, to present evidence in my behalf, to maintain my privilege against self-incrimination, and to the presumption of innocence. I agree to enter my plea as indicated above on the terms and conditions set forth herein.

**NO OTHER PROMISES OR REPRESENTATIONS HAVE BEEN
MADE TO ME BY THE PROSECUTOR, OR BY ANYONE ELSE,
NOR HAVE ANY THREATS BEEN MADE OR FORCE USED TO
INDUCE ME TO PLEAD GUILTY.**

I further have been advised, and understand, that under the Sex Offender

Registration and Notification Act, a federal law, I must register and keep the registration current in each of the following jurisdictions: where I reside; where I am an employee; and where I am a student. I understand that the requirements for registration include providing my name, my residence address, and the names and addresses of any places where I am or will be an employee or a student, among other information. I further understand that the requirement to keep the registration current includes informing at least one jurisdiction in which I reside, am an employee, or am a student not later than three business days after any change of my name, residence, employment, or student status. I have been advised, and understand, that failure to comply with these obligations subjects me to prosecution for failure to register under federal law, 18, United States Code, Section 2250, which is punishable by a fine or imprisonment, or both.

I further state that I have not had any drugs, medication, or alcohol within the past 48 hours except as stated hereafter:

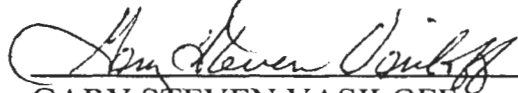
[N/A]
(if none, write "N/A")

I understand that this Plea Agreement will take effect and will be binding as to the Parties **only** after all necessary signatures have been affixed hereto.

I have personally and voluntarily placed my initials on every page of this

Agreement and have signed the signature line below to indicate I have read and approve all of the previous paragraphs of this Agreement, and understand all of the provisions of this Agreement, both individually and as a total binding agreement.

Oct-18, 07
DATE



GARY STEVEN VASILOFF
Defendant

XI. COUNSEL'S ACKNOWLEDGMENT:

I have discussed this case with my client in detail and have advised him of his rights and all possible defenses. My client has conveyed to me that he understands this

Agreement and consents to all its terms. I believe the plea and disposition set forth herein are appropriate under the facts of this case and are in accord with my best judgment. I concur in the entry of the plea as indicated above and on the terms and conditions set forth herein.

10/18/07
DATE



ROBERT TUTEN, ESQ.
Defendant's Counsel

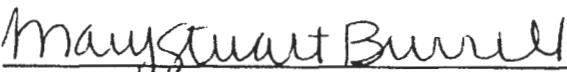
XII. GOVERNMENT'S ACKNOWLEDGMENT:

I have reviewed this matter and concur that the plea and disposition set forth herein are appropriate and are in the interests of justice.

ALICE H. MARTIN
United States Attorney

by:

10-18-2007
DATE



MARY STUART BURRELL
Assistant United States Attorney

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

GARY STEVEN VASILOFF,
Defendant.

*
*
* Case No. CR-07-VEH-0337-M
*
*
* Birmingham, Alabama
* October 18, 2007
* 9:30 a.m.

TRANSCRIPT OF PLEA HEARING
BEFORE THE HONORABLE VIRGINIA EMERSON HOPKINS
UNITED STATES DISTRICT JUDGE

Court Reporter:

Chanetta L. Sinkfield, RMR
325 United States Courthouse
1729 Fifth Avenue North
Birmingham, AL 35203

APPEARANCES

FOR THE PLAINTIFF: ALICE H. MARTIN
U.S. ATTORNEY'S OFFICE
Assistant U.S. Attorney,
MARY STUART BURRELL
400 Meridian Street, Suite 304
Huntsville, Alabama 35801

FOR THE DEFENDANT: ROBERT B. TUTEN, ESQ.
TUTEN LAW OFFICES
223 East Side Square
Huntsville, Alabama 35801

Court Reporter: Chanetta L. Sinkfield, RMR
325 United States Courthouse
1729 Fifth Avenue North
Birmingham, Alabama 35203

P R O C E E D I N G S

THE COURT: Good morning. Counsel, we're here today in the matter of the United States of America versus Gary Steven Vasiloff, case number 07-337.

I am looking at the guilty plea advice of rights certification, and it's not certified by counsel for defendant.

MR. TUTEN: Sorry about that, Your Honor. Let me do that real quick.

THE COURT: That will be fine.

MR. TUTEN: We had some last minute revisions to the plea agreement yesterday. We were scrambling around trying to get the material signed, and I just missed that one. I'm sorry about that.

THE COURT: It's not a problem as long as you get it done now.

MR. TUTEN: Thank you, Your Honor.

THE COURT: You're welcome. All right. I see that Ms. Burrell is present and Mr. Tuten, T-u-t-e-n.

MR. TUTEN: Yes, Your Honor.

THE COURT: Mr. Vasiloff, before I can accept the plea of guilty from you, I must inquire about certain matters, and that inquiry will require that you be placed under an oath. I want to point out to you that while you are under

1 that oath, I may ask you questions pertaining to the offense
2 that you are pleading guilty to or other questions relating to
3 matters relevant to your plea of guilty or to matters relevant
4 to sentencing. Any answers to my questions must be full,
5 complete, and accurate because a false answer or false
6 statement could be used against you as a basis for prosecuting
7 you for perjury or false statement. Do you understand?

8 THE DEFENDANT: Yes, ma'am.

9 THE COURT: Okay. Will you speak a little louder,
10 please?

11 THE DEFENDANT: Yes, ma'am.

12 THE COURT: Thank you.

13 Ms. Berry, would you please administer the oath.

14 THE COURTROOM DEPUTY: If you will stand and raise
15 your right hand, please.

16 Do you swear or affirm to speak the truth, the whole
17 truth, and nothing but the truth so help you God?

18 THE DEFENDANT: Yes, ma'am.

19 THE COURTROOM DEPUTY: You may be seated.

20 THE COURT: Mr. Vasiloff, do you have in front of
21 you a copy of a document entitled Guilty Plea Advice of Rights
22 certification stamped filed October 18th, 2007?

23 THE DEFENDANT: Yes, ma'am.

24 THE COURT: Did you and your attorney fill out that
25 document?

1 THE DEFENDANT: Yes, ma'am.

2 THE COURT: Did you understand the information in
3 that document?

4 THE DEFENDANT: Mostly, yes, ma'am.

5 THE COURT: What did you not understand? Is there
6 anything you want to go over with me?

7 THE DEFENDANT: No, ma'am.

8 THE COURT: Can you tell me any parts of it that you
9 do not understand?

10 THE DEFENDANT: It was just the way some of the
11 stuff was worded. Yes, he helped me through it.

12 THE COURT: Now that your lawyer has talked to you
13 about what's in the document, after his explanation, do you
14 understand the document?

15 THE DEFENDANT: Yes, ma'am.

16 THE COURT: Have you within the past 72 hours taken
17 or received any drugs, intoxicants, narcotics, or medication
18 including prescription medication of any kind?

19 THE DEFENDANT: No, ma'am.

20 THE COURT: Do you have any mental impairment that
21 may affect your ability to understand and respond to any
22 questions?

23 THE DEFENDANT: No, ma'am.

24 THE COURT: Do you have any problem understanding
25 the English language that may affect your ability to

1 understand and respond to any questions?

2 THE DEFENDANT: No, ma'am.

3 THE COURT: Mr. Vasiloff, if anything is said here
4 today or if anything takes place here today that you do not
5 fully understand, I want you to interrupt the proceedings and
6 tell me so. Will you do so?

7 THE DEFENDANT: Yes, ma'am.

8 THE COURT: You can either ask me to clear the
9 matter up for you, or you can ask me to allow you to speak in
10 private with your attorney so that he can clear the matter up,
11 and I will permit either of those. Do you understand?

12 THE DEFENDANT: Yes, ma'am.

13 THE COURT: Okay. I have been informed that the
14 microphones aren't working. So everybody just needs to know
15 that we need to speak up.

16 A plea of guilty is often offered in reliance upon some
17 plea bargain or plea agreement between the defendant and his
18 attorney and the U.S. Attorney's Office. Recommended
19 sentences, plea bargains, and plea agreements are permissible,
20 but they are not binding on the court or the judge. When a
21 plea agreement exist and where a defendant is entering his
22 plea of guilty in reliance upon a plea bargain or plea
23 agreement, the defendant and his attorney and the U.S.
24 Attorney's Office all have the obligation to disclose that
25 fact to the Court and to tell the Court the terms and

1 conditions of any plea bargain or plea agreement that the
2 defendant might be relying on at the time he enters his plea
3 of guilty.

4 I have reviewed the plea agreement that has been entered
5 in this case. Do you have a copy in front of you, Mr.
6 Vasiloff?

7 THE DEFENDANT: Yes, ma'am.

8 THE COURT: Did you sign that agreement?

9 THE DEFENDANT: Yes, ma'am.

10 THE COURT: At this time, I am going to ask the
11 Assistant U.S. Attorney, Mary Stewart Burrell, to advise the
12 Court the extent of that office's knowledge of any recommended
13 sentence, plea bargain, or plea agreement upon which this
14 defendant might be relying here today.

15 You may proceed, Ms. Burrell.

16 MS. BURRELL: Yes, ma'am. Your Honor, the
17 defendant, Gary Steven Vasiloff, is going to plead guilty to
18 Counts 1 through 22 of this indictment and Count 23 of the
19 indictment which is a forfeiture allegation. In exchange,
20 Your Honor, the government's going to recommend that the
21 defendant be sentenced within the advisory guideline range as
22 that range is determined by the Court on the date sentence is
23 pronounced. In calculating the advisory guideline range, the
24 United States will recommend that the defendant receive the
25 maximum credit for acceptance of responsibility for which he

1 is eligible and that the defendant pay a special assessment
2 fee of \$2,200. Said amount due and owing as of the date
3 sentence is pronounced.

4 And Your Honor, on pages 5 and 6 of this plea agreement,
5 the defendant, Gary Steven Vasiloff, has waived certain rights
6 to appeal.

7 THE COURT: All right. Mr. Vasiloff, the plea
8 agreement states the government will recommend the maximum
9 appropriate credit for acceptance of responsibility.

10 Mr. Tuten, does the written plea agreement that is in
11 front of you on the table contain everything that you are
12 aware of that your client relying on by way of a plea bargain
13 or plea agreement?

14 MR. TUTEN: Yes, Your Honor, it does.

15 THE COURT: Before your client signed the plea
16 agreement, did you have a sufficient opportunity to fully
17 discuss it with him?

18 MR. TUTEN: Yes, Your Honor. We did discuss it at
19 length. He had various questions about it which I answered.
20 Some of those questions actually resulted in revisions made to
21 some of the wording, especially in the factual rendition of
22 this case. The new agreement was reviewed with him again this
23 morning, and again I answered all the questions that he had
24 about it.

25 THE COURT: And do you feel that you were able to

1 answer any questions that he had concerning the meaning of the
2 agreement or its operation or effect to his satisfaction?

3 MR. TUTEN: Yes, Your Honor, I was.

4 THE COURT: All right. Thank you, Mr. Tuten.

5 Mr. Vasiloff, does the written plea agreement that is on
6 the table in front of you contain everything that you are
7 relying on at this time by way of a plea bargain or plea
8 agreement?

9 THE DEFENDANT: Yes, ma'am.

10 THE COURT: Before you signed the agreement, did you
11 have a sufficient opportunity to review it with your attorney,
12 Mr. Tuten?

13 THE DEFENDANT: Yes, ma'am.

14 THE COURT: Did you have any questions of Mr. Tuten
15 regarding the meaning of the agreement or how it might operate
16 that he did not answer to your satisfaction?

17 THE DEFENDANT: No, ma'am, he answered all of my
18 questions.

19 THE COURT: Mr. Vasiloff, the plea agreement that
20 you have entered contains language waiving some or all of your
21 rights to plea agreement the sentence to be imposed. Under
22 certain circumstances, the defendant can waive his or her
23 right to appeal, and that type of a waiver may be enforceable.
24 However, if you believe that the waiver that is in your plea
25 agreement is not enforceable, you can appeal the sentence and

1 present that theory to the appellate court.

2 When you signed the plea agreement, did you understand
3 that you were giving up some or all of your rights to appeal?

4 THE DEFENDANT: Yes, ma'am.

5 THE COURT: Do you understand that the U.S.
6 Attorney's Office is required to comply with any obligations
7 imposed upon it by the plea agreement, but that the plea
8 agreement is not binding on the Court Or the Judge?

9 THE DEFENDANT: Yes, ma'am.

10 THE COURT: In other words, do you understand, Mr.
11 Vasiloff, that if I accept your plea of guilty, when I impose
12 a sentence, I could structure a sentence that is totally
13 consistent with the plea agreement or recommendations made by
14 the U.S. Attorney's Office, or I could structure a sentence
15 that could be viewed as substantially more severe or
16 substantially less severe than the contemplated sentence, and
17 yet you would have no right to withdraw the plea of guilty you
18 were in the process of entering? Do you fully understand
19 that?

20 THE DEFENDANT: Yes, ma'am.

21 THE COURT: Other than what is set forth in the plea
22 agreement, has anyone promised you anything to encourage you
23 to enter this plea of guilty?

24 THE DEFENDANT: No, ma'am.

25 THE COURT: Has anyone threatened you in anyway to

1 encourage you to enter this plea of guilty?

2 THE DEFENDANT: No, ma'am.

3 THE COURT: Do you understand that if the Court
4 accepts your plea of guilty, all that remains is for a
5 sentence to be imposed?

6 THE DEFENDANT: Yes, ma'am.

7 THE COURT: I am confident that your attorney has
8 discussed with you the charges asserted in the indictment and
9 the maximum penalties that you could face; however, part of my
10 responsibility today is to make sure that you do indeed
11 understand the charges against you, what the government would
12 have to prove at a trial, and the possible penalties that you
13 could face. Therefore, I want to go over those matters with
14 you.

15 Do you understand that the maximum penalties include as
16 to Counts 1 through 21: A fine of not more than \$250,000.
17 And this applies to each count, so there's 21 counts. So
18 that's 21 times \$250,000. Custody of not less than 15 years
19 and not more than 30 years; again that is each count.
20 Further, if you have a prior conviction of certain types of
21 related offenses, then the custodial term becomes not less
22 than 25 years and not more than 50 years. And if you have two
23 prior convictions of certain related offenses, then the
24 custodial term becomes not less than 35 years and not more
25 than life.

1 There is no allegation that anyone died as a result of
2 anything that Mr. Vasiloff did?

3 MS. BURRELL: No, Your Honor.

4 THE COURT: All right. Your supervised release
5 period following your term of custodial confinement under
6 Counts 1 through 21 for each count is any term of years not
7 less than five years and not more than life. There is an
8 assessment fee of \$100 for each count. Restitution does
9 apply, and the guidelines also apply.

10 As to Count 22, the maximum penalty is a fine of not more
11 than \$250,000. The custodial term is not more than ten years,
12 however, if you had been convicted on one or more prior
13 instances of certain related offenses, then the maximum
14 penalty under Count 22 becomes not less than ten and not more
15 than 20 years. Your custodial term would be followed by
16 supervised release term of any term of years not less than
17 five years and not more than life. There is an assessment fee
18 of \$100. Restitution does apply, and the guidelines although
19 advisory also apply.

20 Count 23 is a forfeiture count, and I am going to ask you
21 if you understand the property that the government -- I'll ask
22 you later if you understand the property that the government
23 seeks forfeiture from you regarding. We'll go over that
24 separately, but it is not a custodial count; it is a
25 forfeiture count where you would lose assets. Assets would be

1 taken from you.

2 Do you understand the maximum penalties that I have just
3 outlined?

4 THE DEFENDANT: Yes, ma'am.

5 THE COURT: Do you also understand that in
6 determining a sentence, the Court must consider applicable
7 sentencing guidelines but may depart from those guidelines?

8 THE DEFENDANT: Yes, ma'am.

9 THE COURT: Have you had sufficient opportunity and
10 time to discuss the guidelines and the fact that they are
11 merely advisory with your attorney?

12 THE DEFENDANT: Yes, ma'am.

13 THE COURT: Mr. Tuten, have you completely discussed
14 with and advised Mr. Vasiloff regarding the sentencing
15 guidelines and the fact that they're merely advisory, that is,
16 not binding on this Court?

17 MR. TUTEN: Yes, Your Honor, I have.

18 THE COURT: Thank you.

19 Mr. Vasiloff, do you also understand that you have a
20 right to insist upon a plea of not guilty?

21 THE DEFENDANT: Yes, ma'am.

22 THE COURT: Do you understand that if you plead not
23 guilty, the burden is upon the government to prove your guilt
24 to a jury beyond a reasonable doubt at a trial where you would
25 have the right to the assistance of a lawyer and the right not

1 to be compelled to incriminate yourself or give evidence
2 against yourself, but that with this plea of guilty, there
3 will be no right to confront and cross-examine the witnesses
4 and the evidence? Do you understand that you are giving up
5 all those rights and protections?

6 THE DEFENDANT: Yes, Your Honor.

7 THE COURT: Is there anything, Mr. Vasiloff that
8 prevents you from understanding anything that I am saying to
9 you at this time?

10 THE DEFENDANT: No, Your Honor.

11 THE COURT: Is there anything that prevents you from
12 understanding anything your attorney says to you when he
13 discusses this matter with you?

14 THE DEFENDANT: No, Your Honor.

15 THE COURT: Is there anything that prevents you from
16 understanding the nature of the charges against you?

17 THE DEFENDANT: No, Your Honor.

18 THE COURT: Is there anything that prevents you from
19 understanding the nature and purpose of these proceedings here
20 today?

21 THE DEFENDANT: No, Your Honor.

22 THE COURT: In the indictment in Counts 1 through
23 21, the grand jury charged that on or about a date between the
24 23rd day of June 2006 and the 14th day of August, 2006, in
25 Cherokee County within the Northern District of Alabama, the

1 defendant, Gary Steven Vasiloff did employ, use, persuade,
2 induce and entice a minor to engage in sexually explicit
3 conduct for the purpose of producing a visual depiction of
4 such conduct. And I will go through specifically the items.
5 Said visual depiction which was produced using materials that
6 had been mailed, shipped, and transported in interstate and
7 foreign commerce in violation of Title 18, United States Code
8 Section 2251. In Count 1, the visual depiction is a
9 photograph that's referred to as Exhibit 1. In Count 2, the
10 visual depiction is a photograph that's referred to as Exhibit
11 2. In Count 3, the visual depiction is a photograph that is
12 referred to as Exhibit 3. In Count 4, the visual depiction is
13 a photograph that's referred to as Exhibit 4. In Count 5, the
14 visual depiction is a photograph that's referred to as Exhibit
15 5. In Count 6, the visual depiction is a photograph that's
16 referred to as Exhibit 6. In Count 7, the visual depiction is
17 a photograph referred to as Exhibit 7. In Count 8, the visual
18 depiction is a photograph referred to as Exhibit 8. In Count
19 9, the visual depiction is a photograph that's referred to as
20 Exhibit 9. In Count 10, the visual depiction is a photograph
21 that's referred to as Exhibit 10. In Count 11, the visual
22 depiction is a photograph referred to as Exhibit 11. In Count
23 12, the visual depiction is a photograph that's referred to as
24 Exhibit 12. In Count 13, the visual depiction is a photograph
25 that's referred to as Exhibit 13. In Count 14, the visual

1 depiction is a photograph that's referred to as Exhibit 14.

2 In Count 15, the visual depiction is a photograph that's

3 referred to as Exhibit 15. In Count 16, the visual depiction

4 is a photograph that's referred to as Exhibit 16. In Count

5 17, the visual depiction is a photograph that's referred to as

6 Exhibit 17. In Count 18, the visual depiction is a photograph

7 referred to as Exhibit 18. In Count 19, the visual depiction

8 is a photograph referred to as Exhibit 19. In Count 20, the

9 visual depiction is a photograph referred to as Exhibit 20.

10 In Count 21, the visual depiction is a photograph referred to

11 as Count 21.

12 Have you seen all of those exhibits?

13 THE DEFENDANT: Yes, ma'am.

14 THE COURT: In Count 21 -- I'm sorry. In Count 22,

15 the grand jury charged that on or about the 23rd day of

16 January 2007, in Cherokee County within the Northern District

17 of Alabama, the defendant, Gary Steven Vasiloff, did knowingly

18 possess material that contained images of child pornography

19 that was produced using materials that had been mailed,

20 shipped, and transported in interstate and foreign commerce in

21 violation of Title 18, United States Code Section

22 2252A(a)(5)(B). In Count 23, the grand jury refers to the

23 allegations of Counts 1 through 22 and states that you are

24 being notified that upon conviction of the offenses listed in

25 Counts 1 and 2 of the indictment, the government is seeking

1 forfeiture of any real or personal property used or intended
2 to be used to promote or commit the commission -- to promote
3 the commission of or to commit the offense alleged in either
4 Count 1 or Count 2 or both.

5 Further, you are notified that if the property that they
6 seek forfeiture of as a result of any act or omission by you
7 can't be located, has been transferred, has been placed beyond
8 the jurisdiction of the Court, has been substantially
9 diminished in value or has been commingled with other party or
10 property which cannot be divided without difficulty, the
11 United States intends to seek forfeiture of any other property
12 that is yours up to the value of the forfeitable property.

13 Before there could be a conviction under Counts 1 through
14 22 and forfeiture under 23 as charged, were those charges to
15 go to a trial, the government would have the burden of proving
16 beyond a reasonable doubt the following: Title 18, United
17 States Code Section 2251(a) makes it a federal crime or
18 offense for any person to knowingly employ, use, persuade,
19 induce, entice, or coerce any minor to engage in any sexually
20 explicit conduct for the purpose of producing a visual
21 depiction of such conduct when the visual depiction was
22 produced using materials that had been mailed, shipped, and
23 transported in interstate or foreign commerce by any means.
24 You are charged with an offense under 18 U.S.C. Section
25 2251(a) in Counts 1 through 21 inclusive. You can be found

1 guilty of the offenses charged in Counts 1 through 21
2 inclusive or any of them only if all of the following facts
3 are proved beyond a reasonable doubt.

4 First, that you knowingly employed, used, persuaded,
5 induced, enticed, or coerced any minor to engage in any
6 sexually explicit conduct as charged; second, that you did so
7 for the purpose of producing a visual depiction of such
8 conduct as charged; and third, that the visual depiction was
9 produced using materials that had been mailed, shipped, and
10 transported in interstate or foreign commerce as charged. And
11 again, the visual depictions are the exhibits that are listed
12 in each count, and you said you had seen those exhibits.

13 THE DEFENDANT: Yes, ma'am.

14 THE COURT: The term "minor" means any person under
15 the age of 18 years. The term "sexually explicit conduct"
16 means actual simulated sexual intercourse whether between
17 persons of the same or opposite sex. Bestiality,
18 masturbation, sadistic or masochistic abuse, lascivious,
19 exhibition of the genitals or pubic area of any person. The
20 term "producing" means producing, directing, manufacturing,
21 issuing, publishing, or advertising. The term "visual
22 depiction" includes but is not limited to undeveloped film and
23 videotape and data stored on computer disk or by electronic
24 means which is capable of conversion into a visual image.

25 The term "interstate or foreign commerce" means movement

1 of property from one state to another state or from one state
2 to another state. The term "state" includes any state of the
3 United States, District of Columbia, and any commonwealth,
4 territory, or possession of the United States. The word
5 "knowingly" means that the act had to be done voluntarily and
6 intentionally and not because of a mistake or an accident.

7 In Counts 22, you are charged with violating 18 U.S.C.
8 Section 2252A(a) (5) (B).

9 (Pause.)

10 THE COURT: Title 18, United States Code Section
11 2252A(a) (5) (B), makes it a federal crime or offense for any
12 person to knowingly possess any book, magazine, periodical,
13 film, videotape, computer disk, or any other material that
14 contains an image of child pornography that has been mailed or
15 shipped or transported in interstate or foreign commerce by
16 any means including by computer or that was produced using
17 materials that had been mailed or shipped or transported in
18 interstate or foreign commerce by any means including by
19 computer.

20 You can be found guilty of that offense only if all of
21 the following facts are proved beyond a reasonable doubt.
22 That you knowingly possessed an item or items of child
23 pornography as charged; that such items of child pornography
24 had been transported or shipped or mailed in interstate or
25 foreign commerce including by computer as charged; and that at

1 the time of such possession you believed that such items
2 constituted or contained child pornography.

3 I have already explained interstate or foreign commerce.
4 The term "child pornography" means any visual depiction
5 including any photograph, film, video, picture, or computer or
6 computer-generated image or picture whether mailed, produced
7 by electronic, mechanical, or other means of sexual explicit
8 conduct where the production of such visual depiction involves
9 use of minor engaging in sexually explicit conduct, or such
10 visual depiction has been created, adapted, or modified to
11 appear that an identifiable minor engaged in sexually explicit
12 conduct. I have explained the term "minor." I don't think we
13 have an identifiable minor issue.

14 MS. BURRELL: No, Your Honor, we do not.

15 THE COURT: I have explained visual depiction. I
16 have explained sexually explicit conduct, and I have explained
17 knowingly. The same explanation applies.

18 MS. BURRELL: Your Honor?

19 THE COURT: Yes.

20 MS. BURRELL: May I clarify the question that you
21 just asked me? We do know who the minor was in these
22 pictures.

23 THE COURT: Right. So there's not a charge of
24 having created, adapted, or modified a visual depiction to
25 appear that an identifiable minor. The charge is there is an

1 actual minor engaging in sexually explicit conduct.

2 MS. BURRELL: That's right, Your Honor.

3 THE COURT: Right. 18 U.S.C. Section 2253 which
4 relates to Count 23 is the forfeiture count, and this title
5 provides that a person who is convicted of an offense
6 including the offenses that are listed in Counts 1 and 2 of
7 the complaint, I'm sorry, the indictment, is subject to the
8 forfeiture of certain property, specifically the visual
9 depictions or any book, magazine, periodical, film, videotape
10 or other matters which contains any such visual depiction
11 which was produced, transported, mailed, shipped or received
12 in violation of the law; any property real or personal
13 constituting or traceable to gross profits or other proceeds
14 obtained from such offense; and any property real or personal
15 used or intended to be used to commit or promote the
16 commission of such an offense or any property traceable to
17 such property.

18 Mr. Vasiloff, do you understand the charges against you?

19 THE DEFENDANT: Yes, ma'am.

20 THE COURT: Have you had sufficient time to discuss
21 these charges with your attorney, Mr. Tuten?

22 THE DEFENDANT: Yes, Your Honor.

23 THE COURT: Are you satisfied with your attorney and
24 the work he has done for you?

25 THE DEFENDANT: Yes, Your Honor.

1 THE COURT: Now I need to ask Mr. Tuten. Mr.
2 Tuten, are you satisfied that Mr. Vasiloff fully understands
3 the charges against him and the consequences of his entering a
4 plea of guilty to those charges?

5 MR. TUTEN: Yes, Your Honor, I am.

6 THE COURT: Are you also satisfied that he's
7 knowingly and voluntarily entering his plea of guilty?

8 MR. TUTEN: Yes, Your Honor, I am so satisfied he
9 does understand that. We had several opportunities to discuss
10 the indictment. During those discussions Mr. Vasiloff asked
11 some very good questions which revealed to me that he
12 understood our discussions and was able to contemplate not
13 only the meaning but also the consequences of a guilty plea
14 related in those charges, and upon answering his questions, he
15 told me that he did understand everything that we had
16 discussed.

17 THE COURT: All right. Did you just say whether or
18 not you were satisfied that he is knowingly and voluntarily
19 entering his plea of guilty?

20 MR. TUTEN: Yes, Your Honor.

21 THE COURT: All right. Have you had sufficient time
22 to investigate the charges against Mr. Vasiloff, to consider
23 any possible defenses he might have to those charges, and
24 generally to give him counsel and advice?

25 MR. TUTEN: Yes, I have, Judge.

1 THE COURT: All right. Mr. Vasiloff, I want you to
2 listen carefully to what the Assistant U.S. Attorney is about
3 to say because she is now going to outline for you and for me
4 some of the evidence she would offer to a jury if this case
5 were to go to a trial. If she says anything that you do not
6 think is true or that you do not think she can prove, I want
7 you to interrupt her and tell me so. Do you understand?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: You may raise your hand or you may have
10 your attorney, Mr. Tuten, let me know what you feel Ms.
11 Burrell has said that is not true, is incorrect, that you
12 disagree with or that you do not believe the government can
13 prove. Now, listen very closely.

14 Ms. Burrell, what would the government expect to prove
15 were this case to proceed to trial?

16 MS. BURRELL: Your Honor, had we gone to trial, the
17 government would have proven that the Alabama Department of
18 Human Resources Assessment of Children at Risk Officials
19 received information and reported the same to the Cherokee
20 County Sheriff's Office, which I will refer to as CCSO,
21 advising that Gary Steve Vasiloff had taken nude photographs
22 of his stepdaughter, age 14, using a dildo and posing in other
23 rude and lascivious positions and had downloaded the photos
24 from his digital camera onto his personal computer. It was
25 also alleged that the victim had been given alcoholic

1 beverages before the pictures were taken.

2 On January 23rd, 2007, the CCSO executed a state search
3 warrant at Vasiloff's residence. Vasiloff's computer was
4 seized along with other items of evidence including a digital
5 camera and a dildo. The CCSO utilized the computer analysis
6 services of the Alabama Computer Forensic Lab to analyze
7 Vasiloff's computer. Vasiloff's computer was analyzed and 21
8 images of child pornography depicting the victim were
9 discovered. Seven additional images of the victim depicting
10 breast nudity were also discovered. In numerous of these
11 pictures, the victim can be seen consuming alcoholic
12 beverages, which she says and would have testified to were
13 given to her by Vasiloff. The images were produced by a
14 camera which was manufactured in the People's Republic of
15 China.

16 The FBI initiated its investigation into the matter after
17 receiving investigating reports from the CCSO on July 17th of
18 2007. On July 31st, 2007, an examiner with the Alabama
19 Computer Forensic Lab provided the FBI with a report of
20 examination of Vasiloff's personal computer. The FBI reviewed
21 the report on July 31st, 2007 and confirmed that the images of
22 child pornography were in fact of the victim in question.

23 On August 8th of 2007, Vasiloff was arrested on a federal
24 complaint charging him with possession of child pornography.
25 After waiving his rights pursuant to Miranda, he confessed to

1 producing the images of a child, depicting his stepdaughter.

2 He admitted that the images had been taken at a deceased
3 relative's abandoned house in Cherokee County, Alabama,
4 between the dates of June 23rd, 2006 and August 14th of 2006.
5 He also turned over the camera used to produce the images.

6 THE COURT: Mr. Vasiloff, you have heard Ms. Burrell
7 outline briefly certain of the facts the government would
8 expect to prove at trial. Are these facts substantially
9 correct?

10 THE DEFENDANT: Yes, Your Honor.

11 THE COURT: She said that you made some confessions
12 and admissions after you were arrested and after you had
13 waived your rights pursuant to Miranda versus Arizona. Did
14 you, before you confessed to producing the images and admitted
15 the images had been taken at a deceased relative's abandoned
16 house, were you advised of your rights under that case?

17 THE DEFENDANT: Yes, Your Honor.

18 THE COURT: And did you waive those rights?

19 THE DEFENDANT: Yes, Your Honor.

20 THE COURT: Were any threats or promises associated
21 with the statements that you made after you were arrested
22 relating to your confessions and admissions?

23 THE DEFENDANT: No, Your Honor.

24 THE COURT: Gary Steven Vasiloff, how do you plead?

25 THE DEFENDANT: Guilty.

1 THE COURT: Did you do the things the Assistant U.S.
2 Attorney said you did?

3 THE DEFENDANT: Yes, Your Honor.

4 THE COURT: Mr. Vasiloff, do you understand that you
5 are not required to enter a plea of guilty and you are free at
6 this time, but this would be the last time you will be free to
7 withdraw your plea of guilty and reinstate your earlier plea
8 of not guilty? Do you understand that?

9 THE DEFENDANT: Yes, Your Honor.

10 THE COURT: Have you heard anything here today that
11 causes you to want to reconsider your decision to enter a plea
12 of guilty?

13 THE DEFENDANT: No, Your Honor.

14 THE COURT: Do you still desire to enter a plea of
15 guilty?

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: Mr. Vasiloff, how do you plead to Count
18 1 of the indictment as charged?

19 THE DEFENDANT: Guilty.

20 THE COURT: How do you plead to Count 2 of the
21 indictment as charged?

22 THE DEFENDANT: Guilty.

23 THE COURT: How do you plead to Count 3 of the
24 indictment as charged?

25 THE DEFENDANT: Guilty.

1 THE COURT: How do you plead to Count 4 of the
2 indictment as charged?

3 THE DEFENDANT: Guilty.

4 THE COURT: How do you plead to Count 5 of the
5 indictment as charged?

6 THE DEFENDANT: Guilty.

7 THE COURT: How do you plead to Count 6 of the
8 indictment as charged?

9 THE DEFENDANT: Guilty.

10 THE COURT: How do you plead to Count 7 of the
11 indictment as charged?

12 THE DEFENDANT: Guilty.

13 THE COURT: How do you plead to Count 8 of the
14 indictment as charged?

15 THE DEFENDANT: Guilty.

16 THE COURT: How do you plead to Count 9 of the
17 indictment as charged?

18 THE DEFENDANT: Guilty.

19 THE COURT: How do you plead to Count 10 of the
20 indictment as charged?

21 THE DEFENDANT: Guilty.

22 THE COURT: How do you plead to Count 11 of the
23 indictment as charged?

24 THE DEFENDANT: Guilty.

25 THE COURT: How do you plead to Count 12 of the

1 indictment as charged?

2 THE DEFENDANT: Guilty.

3 THE COURT: How do you plead to Count 13 of the
4 indictment as charged?

5 THE DEFENDANT: Guilty.

6 THE COURT: How do you plead to Count 14 of the
7 indictment as charged?

8 THE DEFENDANT: Guilty.

9 THE COURT: How do you plead to Count 15 of the
10 indictment as charged?

11 THE DEFENDANT: Guilty.

12 THE COURT: How do you plead to Count 16 of the
13 indictment as charged?

14 THE DEFENDANT: Guilty.

15 THE COURT: How do you plead to Count 17 of the
16 indictment as charged?

17 THE DEFENDANT: Guilty.

18 THE COURT: How do you plead to Count 18 of the
19 indictment as charged?

20 THE DEFENDANT: Guilty.

21 THE COURT: How do you plead to Count 19 of the
22 indictment as charged?

23 THE DEFENDANT: Guilty.

24 THE COURT: How do you plead to Count 20 of the
25 indictment as charged?

1 THE DEFENDANT: Guilty.

2 THE COURT: How do you plead to Count 21 of the
3 indictment as charged?

4 THE DEFENDANT: Guilty.

5 THE COURT: How do you plead to Count 22 of the
6 indictment as charged?

7 THE DEFENDANT: Guilty.

8 THE COURT: Do you consent to the forfeiture under
9 Count 23?

10 THE DEFENDANT: Yes, Your Honor.

11 THE COURT: The Court finds that the defendant's
12 plea of guilty is freely, voluntarily, understandingly, and
13 knowingly offered by him, and that the requisite factual basis
14 for the plea does exist. The plea of guilty is accepted by
15 the Court as to Counts 1 through 22 inclusive, and the
16 defendant's consent to forfeiture under Count 23 is accepted
17 by the Court.

18 The probation office will probably need eight weeks
19 to complete the presentence investigation report. The
20 defendant and his attorney are then allowed 35 days to review
21 that report. I will enter an order setting sentencing
22 approximately ninety days from today. Actually, I can give
23 you the exact date: January 16th, 2008 at 9:30.

24 I will now call your attention to the fact that my
25 written order will require you to file any objections to the

1 presentence report in writing with the Clerk of Court and
2 serve the probation office with a copy within 14 calendar days
3 from the date you receive the report. The same deadlines
4 apply to the government. I will not consider any objections
5 not filed in advance as ordered unless you can provide me with
6 a good reason for not complying with my order. You should
7 receive the order setting sentencing today.

8 Mr. Vasiloff, you are remanded to the custody of the
9 United States Marshal. That concludes this hearing.

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C E R T I F I C A T E

0

I hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-referenced matter.

Chanetta L. Sinkfield

Chanetta L. Sinkfield, RMR

March 4, 2008

2008 Aug-08 PM 02:58
U.S. DISTRICT COURT
N.D. OF ALABAMA

FILED

IN THE UNITED STATES COURT OF APPEALS

08 AUG -8 PM 3: 06
FOR THE ELEVENTH CIRCUIT
U.S. DISTRICT COURT
N.D. OF ALABAMA

08-10412-EE

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

AUG 07 2008

THOMAS K. KAHN
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GARY STEVEN VASILOFF,

Defendant-Appellant.

On Appeal from the United States District Court for the
Northern District of Alabama

BEFORE: ANDERSON, HULL and HILL, Circuit Judges

BY THE COURT:

The Government's motion to dismiss this appeal based on the valid and enforceable sentence appeal waiver in Appellant's plea agreement is GRANTED.

A True Copy
Attested:
Clerk U.S. Court of Appeals, Eleventh Circuit
By: Andrew L. Gore
Deputy Clerk Atlanta, Ga

United States Court of Appeals

Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

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August 07, 2008

Sharon Harris
Clerk, U.S. District Court
1729 5TH AVE N STE 140
BIRMINGHAM AL 35203-2050

Appeal Number: 08-10412-EE
Case Style: USA v. Gary Steven Vasiloff
District Court Number: 07-00337 CR-4-VEH-PWG

RECEIVED
08 AUG - 8 PM 2:33
U.S. DISTRICT COURT
N.D. OF ALABAMA

The enclosed certified copy of this Court's Order of Dismissal is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

The district court clerk is requested to acknowledge receipt on the copy of this letter enclosed to the clerk.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Andrea Ware (404) 335-6218

Encl.

Sharon Harris
Clerk, U.S. District Court
1729 5TH AVE N STE 140
BIRMINGHAM AL 35203-2050

August 07, 2008

Appeal Number: 08-10412-EE
Case Style: USA v. Gary Steven Vasiloff
District Court Number: 07-00337 CR-4-VEH-PWG

TO: Sharon Harris

CC: Robert B. Tuten

CC: Ramona C. Albin

CC: Joyce White Vance

CC: Administrative File

CC: Administrative File

19

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

GARY STEVEN VASILOFF,)	
)	
Movant/Defendant,)	
)	
v.)	4:10-cv-8001-VEH-PWG
)	(4:07-cr-0337-VEH-PWG)
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

MAGISTRATE JUDGE'S FINDINGS & RECOMMENDATION

Gary Steven Vasiloff is serving a sentence of 3,900 months imposed by this court, following his plea of guilty to 21 counts of sexual exploitation of a child, in violation of 18 U.S.C. § 2251(a), and one count of possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B). He initiated this action by filing a *pro se* motion pursuant to 28 U.S.C. § 2255 to vacate, set aside or correct his federal sentence. (Civ. Doc. 1; Crim. Doc. 38)¹. The Government has filed a motion to dismiss, based on the sole ground that all of the claims set forth in Vasiloff's § 2255 motion are subject to a waiver in his plea agreement that precludes him from collaterally attacking his conviction or sentence, except to the extent that his sentence exceeds the statutory maximum. (Civ. Doc. 6). The Government's motion to dismiss is before the undersigned magistrate judge for findings and a recommendation pursuant to 28 U.S.C. § 636(b); Rule 72, Fed. R. Civ. P.; and LR 72.1(b)(3)(B). Upon consideration, it is recommended that the Government's motion to dismiss is

¹Citations to "Civ. Doc(s) ____" are to the document numbers assigned by the clerk to the pleadings in the court file of this § 2255 "civil" case, 4:10-cv-8001-VEH-PWG, as reflected on the docket sheet. Citations to "Crim. Doc. ____" are to the document numbers in the underlying "criminal" case, 4:07-cr-338-VEH-PWG.

due to be denied and that the Government be given an opportunity to file a response addressing the merits of Vasiloff's § 2255 claims.

In *Williams v. United States*, 396 F.3d 1340, 1342 (11th Cir. 2005), the Eleventh Circuit Court of Appeals held that a

valid sentence-appeal waiver precludes a defendant from attempting to attack his sentence through a claim of ineffective assistance of counsel during sentencing. The court recognized, however:

[T]here may be a distinction between a § 2255 claim of ineffective assistance in entering or negotiating the plea versus a claim of ineffectiveness at sentencing or a claim challenging the validity of the plea or agreement. *See, e.g., United States v. Pruitt*, 32 F.3d 431, 433 (9th Cir. 1994) (determining that because defendant's ineffectiveness claim under § 2255 did not relate to the plea or plea agreement but related only to the alleged mishandling of sentencing, the court did not need to decide whether a defendant could in fact waive a claim of ineffective assistance); *see also [United States v.] White*, 307 F.3d [336, 343 (5th Cir. 2002)] (“[A]n ineffective assistance of counsel argument survives a waiver of appeal only when the claimed assistance directly affected the validity of that waiver or the plea itself.”); *[United States v.] Cockerham*, 237 F.3d [1179] at 1191 [(10th Cir. 2001)](holding that ineffective-assistance-of-counsel claim survives express waiver of right to bring collateral attack on sentence “where it challenges the validity of the plea or waiver”). Because Williams’s claims assert ineffectiveness at sentencing and do not concern representation relating to the validity of the plea or waiver, we need not, and do not, reach the other situation.

Williams, 396 F.3d at 1342, n.2. Further, in *United States v. Copeland*, 381 F.3d 1101, 1105 (11th Cir. 2004), the Eleventh Circuit held, in the context of a direct appeal, that the defendant's sentence-appeal waiver which specifically applied only to the sentence imposed did not waive the defendant’s claim that the plea agreement was breached but rather waived only his right to appeal sentencing issues. *Copeland*, 381 F.3d at 1105.

In *Cowart v. United States*, 139 Fed. App’x 206, 207-208 (11th Cir. 2005), the Court relied upon the footnote language in *Williams* and upon *Copeland* in holding that issues related to the

validity of the plea or waiver itself are not precluded by the sentence-appeal waiver. The Court stated:

As in *Copeland*, the language of Cowart's sentence appeal waiver provided that she waived her right "to collaterally attack her sentence," and did not mention a waiver of the right to attack her plea or the plea agreement itself. *See Copeland*, 381 F.3d at 1105. Therefore, Cowart's valid sentence-appeal waiver does not preclude these issues, which relate to the validity of the plea or waiver itself.

139 Fed. App'x at 208. Likewise, in *Patel v. United States*, 252 Fed. App'x 970, 974-975 (11th Cir. 2007), the court expressly held that plea agreement waiver, even if valid, could not preclude consideration of § 2255 claims contesting the validity of the guilty plea or the plea agreement based on counsel's alleged ineffective assistance.

This case is similar to *Cowart* and *Patel* in that the waiver providing that Vasiloff waived his right to challenge in any collateral attack the sentence imposed, the manner in which the sentence was imposed, and any fines or special assessments. The waiver did not mention a waiver of his right to attack the plea or plea agreement itself. Any sentencing issues may ultimately be precluded based upon the waiver; however, under Eleventh Circuit precedent, a challenge to the validity of the plea or plea agreement based on events leading up to the plea or plea agreement (such as the ineffectiveness of counsel) would not be precluded by the waiver in this case.

Based on the foregoing, the magistrate judge RECOMMENDS that the Government's Motion to Dismiss (Civ. Doc. 6) be DENIED and that the Government be given an opportunity to file a response addressing Vasiloff's § 2255 claims on the merits.

Notice of Right to Object

Any party who objects to this report and recommendation must, within 14 days of the date on which it is entered, file specific written objections with the clerk of this court. Failure to do so

will bar any later challenge or review of the factual findings of the magistrate judge. See 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140 (1985); *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982) (en banc). In order to challenge the findings of the magistrate judge, a party must file with the clerk of the court written objections which shall specifically identify the portions of the proposed findings and recommendation to which objection is made and the specific basis for objection. A copy of the objections must be served upon all other parties to the action.

Upon receipt of objections meeting the specificity requirement set out above, a United States District Judge shall make a de novo determination of those portions of the report, proposed findings, or recommendation to which objection is made and may accept, reject, or modify in whole or in part, the findings or recommendations made by the magistrate judge. The district judge, however, need conduct a hearing only in his discretion or if required by law, and may consider the record developed before the magistrate judge, making his own determination on the basis of that record. The district judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Objections not meeting the specificity requirement set out above will not be considered by a district judge. A party may not appeal a magistrate judge's recommendation directly to the United States Court of Appeals for the Eleventh Circuit. Appeals may be made only from a final judgment entered by or at the direction of a district judge.

As to the foregoing it is SO ORDERED this the 4th day of September, 2012.



PAUL W. GREENE
CHIEF MAGISTRATE JUDGE

22

This matter is **REFERRED** back to the magistrate judge.

DONE this the 30th day of October, 2012.



VIRGINIA EMERSON HOPKINS
United States District Judge

25

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

MIDDLE DIVISION

GARY STEVEN VASILOFF)	
)	
v.)	4:10-CV-08001-VEH-MHH
)	
UNITED STATES OF AMERICA)	

UNITED STATES RESPONSE TO § 2255 MOTION

COMES NOW the United States of America, by and through its attorneys, Joyce White Vance, United States Attorney for the Northern District of Alabama, and Mary Stuart Burrell, Assistant United States Attorney, and, in compliance with this Court's order to show cause, responds to Petitioner Gary Steven Vasiloff's Motion Under § 2255 to Vacate, Set Aside, Or Correct Sentence By a Person In Federal Custody, as follows:

I. Vasiloff's Claims Under 28 U.S.C. § 2255 Have No Merit.

Vasiloff's Motion (Document 5) and his subsequent Clarification of Movant's Prior Request (Document 20) allege that his trial counsel rendered ineffective assistance of counsel by recommending that he enter into a plea agreement with the government wherein he waived, with limited exceptions, his right to appeal any

sentence that the court might impose upon him. He asserts that the appeal waiver is invalid because it was the product of ineffective assistance of counsel. More specifically, he argues that a plea agreement is essentially a contract, he gave up his right to appeal in “exchange for nothing.” (Doc. 5 at p. 9.)

“The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prove an ineffective-assistance claim, Vasiloff must show “both incompetence and prejudice: (1) [Vasiloff] must show that counsel’s representation fell below an objective standard of reasonableness, and (2) [Vasiloff] must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Chandler v. United States*, 218 F.3d 1305, 1312-13 (11th Cir. 2000) (*en banc*) (quotations omitted).

A. Deficient Performance. “First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. Specifically, “the defendant must show that counsel’s representation fell below an objective standard of

reasonableness.” *Strickland* at 688; *see also id.* (“The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.”); *Chandler*, 218 F.3d at 1315 (“The reasonableness of a counsel’s performance is an objective inquiry.”). The defendant must “identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment,” and the court must then determine “whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.” *Strickland*, 466 U.S. at 690; *Chandler*, 218 F.3d at 1314. In other words, “a petitioner must establish that *no competent counsel* would have taken the action that his counsel did take.” *Chandler*, 218 F.3d at 1315 (emphasis added). Vasiloff bears the burden “to prove, by a preponderance of competent evidence, that counsel’s performance was unreasonable.” *Id.* at 1313.

Of course, “[j]udicial scrutiny of counsel’s performance must be highly deferential,” and “a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Strickland*, 466 U.S. at 689; *Chandler*, 218 F.3d at 1314.¹ “A fair assessment of attorney performance

¹ “[W]here the record is incomplete or unclear about counsel’s actions, [a court] will presume that he did what he should have done, and that he exercised reasonable professional judgment.” *Chandler*, 218 F.3d at 1314 n.15 (quotations omitted). The presumption of reasonable performance is even stronger when the court reviews the performance of “experienced trial counsel.” *Id.* at 1316.

requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Given the strong presumption that counsel's performance was reasonable, "the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994);² see *Chandler*, 218 F.3d at 1313.

Robert B. Tuten, the trial attorney in this case, prepared an affidavit which is attached to this response as Attachment A. Contrary to Vasiloff's assertion that he gave up his right to appeal in "exchange for nothing," Mr. Tuten recalls the circumstances surrounding the signing of the plea agreement differently. According to Mr. Tuten, Vasiloff never denied his participation in this crime³ and even discussed with his attorney information which, if ever discovered, would have led to additional charges. "The reasonableness of counsel's actions may be determined or substantially

² Although *Rogers* is a Section 2254 case, "the principles developed in habeas cases also apply to § 2255 motions." *Gay v. United States*, 816 F.2d 614, 616 n.1 (11th Cir. 1987) (*per curiam*); see *Conaway v. United States*, 184 Fed. Appx. 890, 891 (11th Cir. 2006) (unpublished) (*per curiam*) ("the principles developed in § 2254 proceedings likewise apply to motions under § 2255").

³ Indeed, Vasiloff admits at page 8 of Document 5 that he caused the illicit photographs to be created.

influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691. In an effort to stop the investigative process, the defendant and the government began plea negotiations. After assurances from the government that the investigation would be closed and no further charges were forthcoming if the defendant pleaded guilty, the defendant signed the plea agreement. Mr. Tuten states that Vasiloff agreed to the terms knowing that "numerous sentencing enhancements . . . could and would be applied to his sentence" and that "his ultimate sentence would be severe." Attachment A. Certainly this negates a showing that Mr. Tuten's performance was objectively unreasonable.

B. Prejudice. Even if a defendant can demonstrate that his counsel's performance was objectively unreasonable, "the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687; *see also id.* at 692 ("[a]ny deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution"). "It is not enough for the defendant to show that the errors had some *conceivable* effect on the outcome of the proceeding"; rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 693-94 (emphasis added); *see also Cross v. United States*, 893 F.2d 1287, 1290 (11th Cir. 1990) (“[p]rejudice is established when there is a reasonable probability that the result of the proceedings would have been different had counsel not performed deficiently”).

A determination of *Strickland* prejudice is “necessarily dependent on a review of the merits” of the underlying claim. *Cross*, 893 F.2d at 1290. “Counsel cannot be labeled ineffective for failing to raise issues which have no merit.” *Card v. Dugger*, 911 F.2d 1494, 1520 (11th Cir. 1990). The issues Vasiloff raises in this motion have no merit.

C. Argument. Vasiloff alleges that had he not signed the appeal waiver in his plea agreement, he would have been able to raise the following issues on appeal: (1) That all counts in the indictment for production of child pornography should have been “grouped” together since the government cannot prove “that there was more than a single production day.” (Doc. 5 at p.15); (2) That enhancements for both “grouping” and “pattern of conduct” comprise an impermissible double counting. (Doc. 5 at p. 17); (3) That the enhancement for “providing alcohol”/ “vulnerable victim” should not have been applied because the beer bottle in one of the photographs was a “prop.” (Doc. 5 at p. 18-19); and (4) He should not have been

convicted of Possession of Child Pornography because the images in question were deleted from his computer. (Doc. 5 at 22).

As to the issue of grouping, the probation office conducted an independent review of the images produced by Vasiloff and made the following findings:

9. The following is an analysis of the child pornography images of MF which **Vasiloff** produced:
10. ***Counts One through Nine:*** These images were taken on June 23, 2006. One of the images depicts the vagina and breast of MF. Another depicts a close-up of the vagina and anus of MF. Two of the images depict MF's vagina while she is naked on a bed. One of the images depicts the anus and vagina of MF. One of the images depicts MF placing a vibrator in her vagina, two other images are close-ups of the victim placing a vibrator in her vagina. Another image depicts the face and body of MF with a vibrator.
11. ***Count Ten:*** This image was taken on July 3, 2006, and depicts a close-up image of MF's vagina.
12. ***Counts Eleven through Thirteen:*** These images were taken on July 1, 2006, and depict MF outdoors while naked

in a vehicle. Her vagina is visible in each image, and she is consuming alcohol.

13. **Count Fourteen:** This image was taken on July 9, 2006, and depicts MF outdoors while naked in a vehicle. Her vagina is visible in each image, and she is consuming alcohol.

14. **Counts Fifteen through Twenty-One:** These images were taken on August 14, 2006. Two of these images depict MF naked on a pillow in a living room. Two of these images depict MF naked outside on a blanket and her vagina is visible. In another of these images, MF is naked outside on a blanket and her vagina and anus are visible. One of these images depicts a close-up of MF's vagina and anus. One of these images depicts a close-up of MF's vagina while she is naked outside on a blanket.

15. In addition, there is at least one uncharged image of MF's breast.

(Presentence Investigation Report (PSR) at p. 6.) For sentencing purposes, the images were "grouped" according to the separate and distinct dates on which each set

of images were produced. This was the correct way to group the images, since each “photo shoot” was a different harm.

United States Sentencing Guidelines Section 3D1.2(b) states “All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule . . . [w]hen counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.” However, application note 4 to this section makes it clear that [t]his provision does not authorize the grouping of offenses that cannot be considered to represent essentially one composite harm (e.g., robbery of the same victim on different occasions involves multiple, separate instances of fear and risk of harm, not one composite harm.) The commentary in the same note additionally gives the following example: (5) The defendant is convicted of two counts of rape for raping the same person on different days. The counts are not to be grouped together.

Vasiloff next argues that enhancements for both “grouping” and “pattern of conduct” or “pattern of activity” was impermissible double counting. In support of the five level enhancement to Vasiloff’s guidelines calculation, the probation officer stated:

Chapter Four Enhancements: Pursuant to §4B1.5 (Repeat and

Dangerous Sex Offender Against Minors), if the defendant's instant offense of conviction is a covered sex crime, neither §4B1.1 nor section (a) of this guideline applies, and the defendant engaged in a pattern of activity involving prohibited sexual conduct, *the offense level shall be 5 plus the offense level determined under Chapters Two and Three*. Application Note 4(A) to the Commentary at § 4B1.5, describes "prohibited sexual conduct" as any of the following (i) any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B); (ii) the production of child pornography; or (iii) trafficking in child pornography, only if previously convicted of felony offense of child pornography. The defendant engaged in a pattern of prohibited sexual conduct when he sexually exploited MF on numerous occasions by producing images of child pornography on more than one occasions, for a total of 21 images. Comment. (n.4)(B) describes the determination of a pattern of activity. An occasion of prohibited sexual conduct may be considered for purposes of subsection (b) without regard to whether the occasion (I) occurred during the course of the instant offense; or (II) resulted in a conviction for the conduct that occurred on that occasion. Therefore, the offense level becomes 47. (It is noted that §4B1.5(a) did not apply because the defendant did not have a prior "sex offense conviction.")

(PSR at p. 13.)

In *United States v. Carter*, 292 Fed.Appx. 16 (11th Cir. 2008), the Court addressed the issue of double counting relative to Chapter 2 and Chapter 4 enhancements.

"Impermissible double counting occurs only when one part of the Guidelines is applied to increase a defendant's punishment on account of a kind of harm that has already been fully accounted for by application of another part of the Guidelines." *United States v. Matos-Rodriguez*, 188 F.3d 1300, 1309 (11th Cir.1999) (internal citation omitted). Double counting is permitted, however, "if the Sentencing Commission intended that result and each guideline section in question concerns conceptually separate notions relating to sentencing." *United*

States v. Stevenson, 68 F.3d 1292, 1294 (11th Cir.1995); *see also United States v. Dudley*, 463 F.3d 1221, 1227 (11th Cir.2006) (finding no impermissible double counting where the Guidelines sections at issue addressed separate harms). “This court presumes the Sentencing Commission intended to apply separate guideline sections cumulatively, *unless* specifically directed otherwise.” *Matos-Rodriguez*, 188 F.3d at 1310. . . .

As stated above, this Court presumes that the Sentencing Commission intended for Guidelines sections to apply cumulatively. Additionally, here we have specific guidance that these sections were not intended to be exclusive of one another. Section 4B1.5(b)(1) states that the enhancement from that section “shall be 5 *plus* the offense level determined under Chapters Two and Three.” (emphasis added). This indicates that the Sentencing Commission intended for the application of enhancements under Chapter Two (like the § 2G2.2(b)(5) enhancement applied here) to be *added* to the § 4B1.5(b)(1) enhancement. These two sections also address different harms. Section 2G2.2(b)(5) addresses the fact that the offense itself involved a pattern of sexually exploiting minors. Section 4B1.5, however, looks at the likelihood that the defendant will become a repeat offender and whether lengthy incarceration is therefore needed to protect the public. *See* U.S.S.G. § 4B1.5(b)(1) cmt. background. The application of sections 2G2.2(b)(5) and 4B1.5(b)(1) did not, therefore, involve impermissible double-counting.

Carter, 292 Fed.Appx. at 3-5. Clearly, this issue is without merit.

Vasiloff’s third argument is that the enhancement for “providing alcohol”/ “vulnerable victim” should not have been applied because the beer bottle in one of the photographs was a “prop.” However, had this issue been raised by the defense, the government was prepared to offer evidence that the victim had disclosed that Vasiloff frequently gave her alcoholic wine coolers, Valium and Xanax. She also

disclosed that these substances were given to her prior to the production of the child pornography. The government also would have introduced the images in question. In two of the images, the victim appears to be asleep or otherwise not conscious. The “prop” as Vasiloff refers to the “beer bottle” appears in three of the images. It is clear in two of the images that there is liquid in the bottle and the victim is drinking from the bottle in one of those images.

Finally, Vasiloff argues that he should not have been convicted of Possession of Child Pornography because the images in question were deleted from his computer. He has attached an affidavit to his motion from a computer science professor who states that “he is confident that [Vasiloff] would have been unable to recover/undelete the files on his computer without the assistance of others and the use of specialize (sic) programs.” He further states that because of this opinion, he is “confident in stating” that Vasiloff neither “actually possessed” the images in question nor had them under his “dominion and control” when his computer was seized by law enforcement. (Doc. 5, Exhibit B at p.2.)

With all due respect to the computer science expert, his opinion is contrary to the law in this circuit. In *United States v. Shiver*, 305 Fed.Appx.640, 643 (11th Cir. 2008), the defendant argued that since all of the images of child pornography on his computer had been deleted and stored in the computer’s unallocated files, and since

he lacked the “forensic software” to access or retrieve them from that location, he consequently lacked the ability to exercise dominion or control over the images. The Court found, however, that even if it were true that the defendant was in fact unable to retrieve the deleted images from the unallocated space of his hard drive, he did exercise dominion and control over them when he deleted them.

III. Conclusion

As outlined above, any challenge on appeal of the issues Vasiloff would have raised had he not signed the appeal waiver would have been futile. Therefore, his allegations in the pending motion are insufficient to support a finding of deficient performance or prejudice. Therefore, the United States respectfully requests that because Vasiloff has not pleaded facts or presented sufficient evidence or argument demonstrating that he is entitled to an evidentiary hearing, his claims for relief should be summarily denied. *See, e.g., Blacklidge v. Allison*, 431 U.S. 63, 73-74 (1977); *Tejada v. Dugger*, 941 U.S. 1551, 1559 (11th Cir. 1991).

Respectfully submitted this the 19th day of December, 2012.

JOYCE WHITE VANCE
United States Attorney

Mary Stuart Burrell

MARY STUART BURRELL
Assistant United States Attorney

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served on the appellant by mailing a copy of same to him (acting pro-se) by First Class, United States Mail, postage prepaid, this the 19th day of December, 2012, at the following address:

Gary Steven Vasiloff
Reg. No. 26486-001
USP Tucson
P.O. Box 24550
Tucson, Arizona 85734

Mary Stuart Burrell

MARY STUART BURRELL
Assistant United States Attorney

AFFIDAVIT OF ROBERT B. TUTEN

Comes now ROBERT B. TUTEN, after being duly sworn and deposes and states as follows:

My name is Robert B. Tuten. I am a practicing attorney in Huntsville, AL. I was appointed under the CJA to represent Mr. Vasiloff in a child pornography case. From the beginning, Mr. Vasiloff admitted his guilt. The evidence against him was overwhelming. Mr. Vasiloff also informed me of information that caused us to believe that other related charges would be filed against him if this information ever came to light through his admission or through a more thorough investigation. I shall not divulge this information as it is covered by the attorney client privilege. Mr. Vasiloff did not want a trial as trial preparation could result in the Government discovering the additional information about the case. Further, Mr. Vasiloff could not testify at a trial without the probability of his testimony revealing to the Government information that could and probably would lead to more charges.

After lengthy discussions with Mr. Vasiloff, he decided that resolving his case by guilty plea was in his best interests. Mr. Vasiloff and I reviewed the United States Sentencing Guidelines that applied to his case. Mr. Vasiloff knew that there were numerous sentencing enhancements that could and would be applied to his sentence. Mr. Vasiloff knew that the sentencing enhancements would cause his ultimate sentence to be severe. Mr. Vasiloff was not sentenced to "life". However, given his age and given the length of his sentence, in reality he will probably never be released from prison.

The benefit Mr. Vasiloff derived from his plea agreement was a recommendation of a sentence at the low end of the sentencing guidelines, a reduction in guideline level for acceptance of responsibility, and reasonable assurances from the Government that the investigation was closed and that there were no other possible charges that would be filed in the Northern District of Alabama.

When Mr. Vasiloff decided to appeal his conviction he was already in prison. I wrote to him and asked him to tell me what issues he wanted to raise in his appeal. He never responded to any of my letters. Therefore, I reviewed his transcript and formulated issues to raise on appeal on my own.

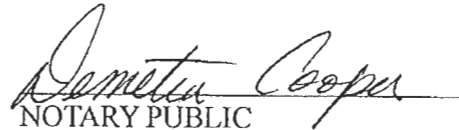


ROBERT B. TUTEN

STATE OF ALABAMA
COUNTY OF MADISON

VERIFICATION

BEFORE ME, the undersigned Notary Public in and for said County and State, personally appeared ROBERT B. TUTEN, whose name is signed to the foregoing testimony, and who is known to me, acknowledged before me on this date, that he signed the foregoing voluntarily and that the facts contained therein are true and correct on this the 26th day of November, 2012.


NOTARY PUBLIC

My Commission Expires: 1-27-15

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION**

GARY STEVEN VASILOFF,)

Petitioner,)

v.)

**Case No. 4:10-cv-8001-VEH-MHH
(Crim. No. 4:07-cr-337-VEH-PWG)**

UNITED STATES OF AMERICA,)

Respondent.)

REPORT AND RECOMMENDATION

Movant Gary Steven Vasiloff seeks relief from a 3,900 month sentence that the Court imposed after Mr. Vasiloff pled guilty to 21 counts of sexual exploitation of a child (his then 14-year-old stepdaughter) and one count of possession of child pornography. Pursuant to 28 U.S.C. § 2255, Mr. Vasiloff asks the Court to vacate, set aside, or correct his sentence. (Doc. 1; Crim. Doc. 38).¹ Mr. Vasiloff contends that the sentence is unconstitutional and that his counsel was ineffective for a variety of reasons, including his attorney's purported failure to obtain adequate consideration for the appeal waiver in Mr. Vasiloff's plea

¹ Citations to the record concerning Mr. Vasiloff's §2255 motion appear throughout this Report and Recommendation as "(Doc. ____)." Citations to the record in the criminal proceedings against Mr. Vasiloff appear as "(Crim. Doc. ____)."

agreement. (*Id.*) After reviewing the record concerning Mr. Vasiloff's § 2255 motion and the record from Mr. Vasiloff's criminal case, the undersigned magistrate judge recommends that the District Court deny the § 2255 motion.

OPERATIVE FACTS

On August 8, 2007, the Government filed a complaint against Mr. Vasiloff for possession of images of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). (Crim. Doc. 1). Thereafter, the grand jury returned a twenty-three count indictment against Mr. Vasiloff. (Crim. Doc. 9). Counts one through twenty-one of the indictment charge that Mr. Vasiloff violated 18 U.S.C. § 2251(a) by inducing and using a minor to engage in sexually explicit conduct for the purposes of producing a photograph of the conduct, using materials that had traveled in interstate and foreign commerce. Each of the twenty-one counts corresponds to a separate photograph that Mr. Vasiloff took of his then 14-year-old stepdaughter. (Crim. Doc. 9, pp. 1-13; Crim. Doc. 28, p. 10-11). Count twenty-two charges that Mr. Vasiloff violated 18 U.S.C. § 2252A(a)(5)(B) because he possessed images of child pornography that were produced using materials that had traveled in interstate and foreign commerce. (Crim. Doc. 9, p.

13).²

On October 18, 2007, Mr. Vasiloff signed a plea agreement in which he agreed to plead guilty to twenty-one production counts and one possession of child pornography count. (Crim. Doc. 15, p. 1). In the agreement, Mr. Vasiloff stipulated that the following facts are accurate and provide the basis for his plea:

The Alabama Department of Human Resources Assessment of Children at Risk officials received information and reported the same to the Cherokee County Sheriff's Office (CCSO) advising that Gary Steven Vasiloff had taken nude photographs of his stepdaughter (age 14) using a dildo and posing in other lewd and lascivious positions, and had downloaded the photos from his digital camera onto his personal computer. It was also alleged that the victim had been given alcoholic beverages before the pictures were taken.

On January 23, 2007, the CCSO executed a state search warrant at Vasiloff's residence. Vasiloff's computer was seized, along with other items of evidence, including a digital camera and a dildo. The CCSO utilized the computer analysis services of the Alabama Computer Forensic Lab to analyze Vasiloff's computer. Vasiloff's computer was analyzed and twenty-one images of child pornography depicting the victim were discovered. Seven additional images of the victim depicting breast nudity were also discovered. In numerous of these pictures, the victim can be seen consuming alcoholic beverages she says were given to her by Vasiloff. The images were produced by a Concord camera, which was manufactured in the People's Republic of China.

The FBI initiated its investigation into the matter after receiving investigative reports from the CCSO on July 17, 2007. On July 31, 2007, an

² Pursuant to 18 U.S.C. § 2253(a)(3), the Government demanded a forfeiture of property. (Crim. Doc. 9, pp. 13-14).

examiner with the Alabama Computer Forensic Lab provided the FBI with a report of examination of Vasiloff's personal computer. The FBI reviewed the report on July 31, 2007, and confirmed the images of child pornography were in fact of the victim in question.

On August 8, 2007, Vasiloff was arrested on a federal complaint charging him with Possession of Child Pornography. After waiving his rights pursuant to Miranda, he confessed to producing the images of child pornography depicting his stepdaughter. He admitted that the images had been taken at a deceased relative's abandoned house in Cherokee County, Alabama, between the dates of June 23, 2006, and August 14, 2006. He also turned over the Concord camera used to produce the images.

(Crim Doc. 15, pp. 3-4).

Under the terms of the plea agreement, the parties acknowledged that the maximum statutory punishment that a court could impose for production of child pornography was imprisonment for not more than 30 years. (Crim. Doc. 15, p. 2). The maximum statutory punishment for possession of child pornography was imprisonment for not more than 10 years. (*Id.* at 3).

The plea agreement contains a provision pursuant to which Mr. Vasiloff, with one narrow exception, waived his right to appeal or to attack collaterally via a § 2255 motion the sentence that the Court imposed following his plea. The waiver provision states:

I, GARY STEVEN VASILOFF, hereby waive my right to appeal my conviction in this case, any fines, restitution, and/or sentence (including one for revocation of release) that the court might impose upon me, and the right to challenge any sentence so imposed or the

manner in which the sentence was determined in any collateral attack, including, but not limited to, a motion brought under 28 U.S.C. § 2255, subject to the following limitations:

The defendant reserves the right to contest in an appeal or post-conviction proceeding:

- (a) Any sentence imposed in excess of the applicable statutory maximum sentence(s).**

The defendant acknowledges that before giving up these rights, he discussed the Federal Sentencing Guidelines and their application to his case with his attorney, who explained them to his satisfaction. The defendant further acknowledges and understands that the government retains its right to appeal where authorized by statute.

I, GARY STEVEN VASILOFF, hereby place my signature on the line directly below to signify that I fully understand the foregoing paragraphs, and that I am knowingly and voluntarily entering into this waiver.

(Crim. Doc. 15, pp. 5-6) (emphasis in original)(signature on original).

After Mr. Vasiloff signed the plea agreement, the District Court held a change of plea hearing. (Crim. Doc. October 18, 2007 minute entry; Crim. Doc. 27). Before accepting Mr. Vasiloff's guilty plea, the District Court judge placed Mr. Vasiloff under oath and questioned him about his understanding of the plea and matters relevant to sentencing. (Crim. Doc. 27, pp. 3:22-4:7). The Court first asked Mr. Vasiloff whether he understood the Guilty Plea Advice of Rights Certification that he and his attorney signed. (*See* Crim. Doc. 14). Mr. Vasiloff

acknowledged that his attorney explained the form to him:

THE COURT: Mr. Vasiloff, do you have in front of you a copy of a document entitled Guilty Plea Advice of Rights certification stamped filed October 18th, 2007?

THE DEFENDANT: Yes, ma'am.

THE COURT: Did you and your attorney fill out that document?

THE DEFENDANT: Yes, ma'am.

THE COURT: Did you understand the information in that document?

THE DEFENDANT: Mostly, yes, ma'am.

THE COURT: What did you not understand? Is there anything you want to go over with me?

THE DEFENDANT: No, ma'am.

THE COURT: Can you tell me any parts of it that you do not understand?

THE DEFENDANT: It was just the way some of the stuff was worded. Yes, he helped me through it.

THE COURT: Now that your lawyer has talked to you about what's in the document, after his explanation, do you understand the document?

THE DEFENDANT: Yes, ma'am.

(Crim. Doc. 27, pp. 4:20-5:15).³

³ The Advice of Rights Certification contains several pertinent provisions. It states, for example: "The court must be satisfied that the defendant has not been coerced by any threat or

Mr. Vasiloff told the Court that before he signed the plea agreement, he had sufficient opportunity to review the agreement with his attorney, Mr. Tuten. He stated that Mr. Tuten answered all of his questions. (Crim. Doc. 27, p. 9:10-18). The Court informed Mr. Vasiloff that the plea agreement contained a waiver provision, pursuant to which he was waiving his right to appeal certain issues. (*Id.* at 9:19-10:3). Mr. Vasiloff told the Court that he understood that he was giving up some or all of his rights to appeal. (*Id.* at 10:4).

Before accepting the guilty plea, the District Court asked Mr. Vasiloff if he understood that the Court had the option of imposing a variety of sentences:

In other words, do you understand, Mr. Vasiloff, that if I accept your plea of guilty, when I impose a sentence, I could structure a sentence that is totally consistent with the plea agreement or recommendations made by the U.S. Attorney's Office, or I could structure a sentence that could be viewed as substantially more severe or substantially less severe than the contemplated sentence, and yet you would have no right to withdraw the plea of guilty you were in the process of entering? Do you fully understand that?

(Crim. Doc. 27, p. 10:10-19). Mr. Vasiloff told the Court that he understood. (*Id.* at 10:20). Thereafter, the Court explained the maximum penalties relating to Mr. Vasiloff's charges. (*Id.* at 11:7-12:19). In doing so, the Court explicitly stated

induced by any improper promise to enter the guilty plea, but that the plea is the free, uncoerced and voluntary choice of the defendant." (Crim. Doc. 14, p. 2). After that provision, there are two blanks for the defendant to select either "Done" or "Not Done." (*Id.*) Mr. Vasiloff initialed "Done." (*Id.*)

that the available penalties for “Counts 1 through 21” applied to *each* count:

Do you understand that the maximum penalties as to Counts 1 through 21: A fine of not more than \$250,000. And this applies to each count, so there’s 21 counts. So that’s 21 times \$250,000. Custody of not less than 15 years and not more than 30 years; again that is each count.

(Crim. Doc. 27, p. 11:15-19). The Court also noted that as to Count 22, “the custodial term is not more than ten years.” (Crim. Doc. 27, p. 12). Mr. Vasiloff stated that he understood the maximum penalties. (*Id.* at 13). Additionally, Mr. Vasiloff acknowledged that, “the Court must consider applicable sentencing guidelines but may depart from those guidelines.” (*Id.* at 13). His attorney, Mr. Tuten, confirmed that he, “completely discussed with and advised Mr. Vasiloff regarding the sentencing guidelines and the fact that they’re merely advisory.” (*Id.* at 13).

Mr. Vasiloff recognized that he had a right to insist upon a plea of not guilty. (Crim. Doc. 27, p. 13:19-21). The Court reviewed with Mr. Vasiloff all the charges and definitions of the indictment. (*Id.* at 14:22-21:17). Mr. Vasiloff told the Court that he understood the charges against him and that he had seen all of the photographs at issue. (*Id.* at 14-16, 18). Additionally, the Court asked Mr. Vasiloff if he was satisfied with his attorney. (*Id.* at 21:23-25). Mr. Vasiloff responded, “[y]es, your honor.” (*Id.*)

The Court gave the Government an opportunity to outline the evidence the Government would present if the case were to proceed to trial. (Crim. Doc. 27, p. 23:2-7). The Court directed Mr. Vasiloff to interrupt the Government if he believed that any of the Government's evidence was not true or could not be proved. (*Id.*) The Government outlined its case. (*Id.* at 23:16-25:5). Mr. Vasiloff told the Court that the facts the Government presented were substantially correct, including the Government's assertion that Mr. Vasiloff admitted that the images were taken "between the dates of June 23, 2006 and August 14, 2006." (*Id.* at 25:10). The Court informed Mr. Vasiloff that he was not required to plead guilty and that he was free to withdraw his guilty plea. (*Id.* at 26:4-7). Mr. Vasiloff still pled guilty. (*Id.* at 26:16). The Court found that Mr. Vasiloff's guilty plea was "freely, voluntarily, understandingly, and knowingly offered by him," and the Court accepted his guilty plea. (*Id.* at p. 29:11-17).

On January 16, 2008, the Court sentenced Mr. Vasiloff. (Crim. Doc. 28). Mr. Tuten, Mr. Vasiloff's counsel, acknowledged that he and Mr. Vasiloff had 35 days to review the presentence report. (*Id.* at 3:11-13). Mr. Vasiloff did not object to the report. (*Id.* at 3:14-17).

The Court noted that, "in his plea agreement, [Mr. Vasiloff] admitted certain facts that bear upon the computation of his offense level under the guidelines."

(Crim. Doc. 28, p. 3:23-25). The Court then stated, “[t]here being no objections, the Court adopts the factual statements contained in the presentence report and makes specific findings that the guidelines offense level is 43, the criminal history category is 1, and the advisory guideline imprisonment term is life. However, the defendant will be sentenced within the statutory limitations set forth in United States Sentencing Guidelines Section 5G1.2(d).” (*Id.* at 4:15-22). The Court stated that it determined the guideline sentence by stacking the statutory minimums for counts 1 through 21 and the statutory maximum for count 22. (*Id.* at 15:14-17). Mr. Vasiloff’s attorney objected to the stacking of the statutory minimums on Counts 1 through 21. (Crim. Doc. 28, p. 16:4-6).

Mr. Tuten asked the Court for a variance from the sentence. (Crim. Doc. 28 at p. 5:9-11). He argued, among other things, that Mr. Vasiloff was over 50 years old at the time of sentencing; that Mr. Vasiloff did not have an adult criminal history; and that Mr. Vasiloff deleted the images at issue from his computer before the federal investigation of his conduct began, indicating that he did not intend to “trade, sell, distribute, or keep” the images. (Crim. Doc. 28, pp. 6-7). Mr. Tuten also asked the Court to consider the Eleventh Circuit Court of Appeals’s decision in *United States v. McBride*, a case in which the court of appeals affirmed a “lenient” sentence of a defendant “charged with possessing 981 images and 45

separate videos involving child pornography.” (*Id.* at 8-9). Finally, Mr. Vasiloff offered a statement in which he explained that he deleted the images from his computer to prevent them from being “posted on the internet on sites.” (*Id.* at 9).

In response to Mr. Tuten’s request for a variance, the Government made a proffer of evidence to memorialize the results of the Government’s investigation. The Government explained that it had evidence that demonstrated that Mr. Vasiloff initially tried to cover up his conduct. Specifically, after his stepdaughter was removed from his home, she reported to the person who was acting as her foster mother that Mr. Vasiloff, “had given her a dildo and taught her how to use it; had taken pictures of her; had given her alcoholic beverages. She also alleges that he gave her controlled substances when this was happening . . .” (Crim. Doc. 28, p. 11). DHR became involved, and state court hearings followed. According to the Government, at those hearings, Mr. Vasiloff reported that his stepdaughter, “was a habitual liar . . . He said that she had a mental illness. He said that she had had a physical illness wherein she had gotten a really high fever and it caused her to hallucinate and she had hallucinated these things. He said that she had been taking medication and even produced the medication in court at one point; said that one of the side effects of the medication was that it made her hallucinate and make up things and be a habitual liar.” (Crim. Doc. 28, pp. 11-12).

The Government informed the Court that Mr. Vasiloff did not take responsibility for his conduct until after the FBI recovered the pictures from his computer and placed the photographs in front of Mr. Vasiloff. (Crim. Doc. 28, p. 12). The Government presented the pictures to the Court, and Mr. Tuten stated that Mr. Vasiloff did not deny taking the pictures. (Crim. Doc. 28, p. 13).⁴

The Court acknowledged that stacking the mandatory minimum sentences for 21 production counts and the maximum sentence for the possession count produced “an extraordinarily long sentence” of 3,900 months “which is 325 years, which is basically just another way of saying life,” but the Court saw no reason to vary from that sentence. (Crim. Doc. 28, p. 16:7-10). Explaining her decision not to vary from the guideline range, the Court stated:

The fact that Mr. Vasiloff used his position as the stepfather or surrogate father -- and by surrogate father, I mean more than stepfather. There was a close relationship where the child looked on Mr. Vasiloff as the person who had been in the role of her father makes this wors[e]. Although any child should not go through what this child went through, but the fact that Mr. Vasiloff was [for all intents and] purposes her father makes this worst. The fact that the mother was in the hospital just gave Mr. Vasiloff more access to his stepdaughter without any fear of discovery by his wife.

⁴ With respect to Mr. Vasiloff’s motion for variance, the Court noted that as opposed to variance, there was no motion for departure from the guidelines, meaning that “the only argument that the defendant is making is that the sentence – that the guidelines calculation is not reasonable under the facts and circumstances of this case.” (Crim. Doc. 28, p. 15). Mr. Vasiloff’s counsel agreed and acknowledged that he was objecting to the stacking of the statutory minimums. (Crim. Doc. 28, pp. 15-16).

...

But because of the relationship between Mr. Vasiloff and this particular child, it's not only, you know, the production of child pornography or sexual exploitation of a child, but it's sexual exploitation of a child who in everything but a biological sense was the daughter of the perpetrator, and so it's incestuous type. Well, although I guess technically incest. It's just that type of violation. And the level of -- I mean, I am not a psychologist or psychiatrist, but the level of the impact on the victim, in my experience with these cases coming before me, is exacerbated when there is an incestuous type exploitation.

...

So, now I do note that the photographs were taken within a relatively short period of time; two months, I think, sixty days . . . So I have considered the fact that it was over a short period of time, and that may lessen the damage to the stepdaughter. I hope. I hope so. I would assume that a shorter period of time would be easier to recover from [than] years of abuse and exploitation. But he didn't just take pictures of his stepdaughter, he got her to perform sex acts, and they weren't sex acts on him or with him; they were with a dildo. So I have considered that. Therefore, I am not going to vary. And pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Gary Steven Vasiloff, is hereby committed to custody of the Bureau of Prisons to be in prison for a term of [180] months for Counts 1 through 21, each count, separately, and 120 months as to Count 22 separately with each count to be served consecutively to the other. The total sentence imposed is 3,900 months pursuant to the United States Sentencing Guidelines Section 5G1.2(b).

(Crim. Doc. 28, pp. 16-19). The Court continued:

the Court finds that the sentence imposed is sufficient but not greater than necessary to comply with the statutory purposes of sentencing. Furthermore, the sentence is reasonable when considering the following sentencing factors found at 18 U.S.C. 3553(a), the nature and circumstances of the offense -- and I have talked about that in terms of, well, I may not

have specifically mentioned that the child was 14 at the time, but I considered that; her relationship with Mr. Vasiloff. I also considered the fact that Mr. Vasiloff doesn't have any real prior criminal history. I also considered the fact that the sexual exploitation involved causing the child to perform sex acts on herself, specifically, to penetrate herself with a dildo, in addition to the photographing of her. To reflect the seriousness of the offense; to promote respect for the law; and to provide just punishment for the offense; sexual exploitation of children -- the avoidance of that, the prohibition of that, and therefore the punishment of that to deter it by others -- certainly Mr. Vasiloff is not going to have an opportunity to do it again -- is about as important as [a] core value as I think this country has. And so the offense is extremely serious, and it's reflected in the sentence, and I think that the sentence does provide just punishment for the offense under all the facts and circumstances of this case.

(Crim. Doc. 28, pp. 19-20). Mr. Tuten re-newed Mr. Vasiloff's objection to the sentence. (*Id.* at 23).

On January 25, 2008, Mr. Vasiloff filed a notice of appeal to the Eleventh Circuit Court of Appeals, seeking relief from his sentence. (Crim. Doc. 22). The Government moved to dismiss the appeal based on the appeal waiver in the plea agreement. The Eleventh Circuit granted the Government's motion. (Crim. Doc. 34). On January 15, 2009, the Supreme Court of the United States denied Mr. Vasiloff's petition for writ of certiorari. (Crim. Doc. 37).

On January 14, 2010, Mr. Vasiloff filed this 28 U.S.C. § 2255 motion. Mr. Vasiloff contends that the Court should vacate his sentence, set it aside or correct it because his counsel was ineffective during his plea negotiations, and his

sentence is unconstitutional. Mr. Vasiloff offers twelve grounds for relief:

1. Ineffective assistance of counsel in negotiating an appeal waiver without securing a true/actual benefit.
2. Compulsion, by ineffective counsel, with knowing complicity of other parties, to waive all my constitutional rights (based on an unrealistic unspoken promise).
3. Ineffective counsel never requested proof of the USPO-asserted “production dates” used to “group” the offense resulting in an incorrect sentencing enhancement and (inappropriately compelled me to waive this issue).
4. Ineffective counsel never requested proof of “multiple photo shoot dates”– and compelled me to waiver this argument–resulting in an inappropriate five-level enhancement for pattern of conduct.
5. The “providing alcohol to a minor making them vulnerable” enhancement [3A1.1(b)(1)] argument only succeeded because of IAC who then improperly compelled me to waive the argument.
6. It is multiplicitous [sic] – causing this Court to lose jurisdiction – when more than one “production” count is charged for a single “photo-shoot”. (Also IAC not to argue/appeal this fact).
7. Constitutional and legal errors render this conviction invalid.
8. Constitutional and legal errors render this sentence invalid.
9. Cumulative error causes the conviction and/or sentence to be invalid.
10. My Constitutional right to “due process” and freedom from “cruel and unusual punishment” was violated by my lengthy sentence.

11. Offense level 43 (or 44) should NOT be “mandatory Life” but instead be a “range” (as are levels 1-42 at Criminal History I).
12. “Appeal waiver” (if not plea agreement itself) should be invalidated due to contract principles of “Lack of consideration” or “Mutual Mistake.”

(Doc. 1; Crim. Doc. 38).

The Government filed a motion to dismiss, citing the waiver provision in Mr. Vasiloff’s plea agreement. (Doc. 6). Mr. Vasiloff filed a response to the Government’s motion to dismiss. (Doc. 12, 15). The magistrate judge recommended that the Court deny the Government’s motion to dismiss because Mr. Vasiloff’s claims concern the validity of the appeal waiver and his plea.⁵ (Doc. 19). The Court adopted the recommendation and denied the Government’s motion to dismiss. (Doc. 22).

The Government filed a response to Mr. Vasiloff’s § 2255 motion. (Doc. 25). The Court issued a *McBride* order notifying the parties that the case was ripe for summary disposition. (Doc. 27). Mr. Vasiloff filed a reply brief and supplemental argument. (Docs. 34-36). He also filed motions for an evidentiary hearing and for court-appointed counsel. (Docs. 30, 32). On this record, the undersigned considers Mr. Vasiloff’s motion for relief from the 3,900 month

⁵ This case was reassigned to the undersigned magistrate judge following the retirement of Chief Magistrate Judge Paul W. Greene.

sentence that he currently is serving.

DISCUSSION

Pursuant to 28 U.S.C. § 2255, if the Court finds that the sentence imposed on Mr. Vasiloff “was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack,” then the Court must “vacate and set the judgment aside” and “discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.” 28 U.S.C. § 2255(b). Mr. Vasiloff advances several arguments in support of his motion to vacate, set aside, or correct his sentence. In grounds one, two and twelve, Mr. Vasiloff contends that his counsel was ineffective during the plea negotiations. Because his counsel was ineffective, Mr. Vasiloff asserts that his appeal waiver is invalid. In the remaining grounds, Mr. Vasiloff contends that the enhancements discussed in his presentence investigation report are improper and that his sentence is unconstitutional. The record contradicts Mr. Vasiloff’s assertion that he received ineffective assistance of counsel, and it supports his sentence. Consequently, Mr. Vasiloff is not entitled to habeas relief.

I. MR. VASILOFF HAS NOT CARRIED HIS BURDEN WITH RESPECT TO HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

Mr. Vasiloff contends that his trial counsel was ineffective during the plea negotiation. A petitioner may raise ineffective assistance of counsel claims with respect to plea negotiations despite a valid appeal waiver. *Vasiloff v. United States*, 2012 WL 5379334, *1 (N.D. Ala. 2012) (citing *Williams v. United States*, 396 F.3d 1340, 1342 (11th Cir. 2005)).

To succeed on a claim of ineffective assistance of counsel, the petitioner must establish: (1) deficient performance—that his “counsel’s representation fell below an objective standard of reasonableness;” and (2) prejudice—but for the deficiency in representation, “a reasonable probability exists that the result of the proceeding would have been different.” *See Strickland v. Washington*, 466 U.S. 668, 688-696 (1984); *see also Chandler v. United States*, 218 F.3d 1305, 1312-1313 (11th Cir. 2000). The burden of proving ineffective assistance remains with the movant at all times. *Chandler*, 218 F.3d at 1315 n. 15.

The performance prong of *Strickland* “requires a petitioner to establish that counsel performed outside the wide range of reasonable professional assistance and made errors so serious that he failed to function as the kind of counsel

guaranteed by the Sixth Amendment.” *Butcher v. United States*, 368 F.3d 1290, 1293 (11th Cir. 2004). The proper measure of attorney performance is “reasonableness under prevailing professional norms.” *Strickland*, 466 U.S. at 688. Because a wide range of performance is constitutionally acceptable, “the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between.” *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994). Courts “are not interested in grading lawyers’ performances” but “are interested in whether the adversarial process at trial ... worked adequately.” *Id.* at 386. To be unreasonable, the performance must be such that “no competent counsel would have taken the action that his counsel did take.” *Grayson v. Thompson*, 257 F.3d 1194, 1216 (11th Cir. 2001). “[E]ven if many reasonable lawyers would not have done as defense counsel did,” a court cannot grant relief on ineffectiveness grounds unless the petitioner shows “that no reasonable lawyer, in the circumstances, would have” taken similar action. *Rogers*, 13 F.3d at 386.

The prejudice prong of *Strickland* “requires a petitioner to demonstrate that seriously deficient performance of his attorney prejudiced the defense.” *Butcher*, 368 F.3d at 1293. In the guilty-plea context, a petitioner must establish “a reasonable probability that, but for counsel’s errors, he would not have pleaded

guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Similarly, in the sentencing context, a petitioner must establish a reasonable probability that, but for counsel’s deficient performance, the result of the sentencing proceeding would have been different. *Glover v. United States*, 531 U.S. 198, 203-04 (2001). Informed by this precedent, the undersigned recommends that this Court find that Mr. Vasiloff’s ineffective assistance of counsel claim fails because he has established neither deficient performance by his trial counsel nor prejudice created by the alleged deficiency.

A. Mr. Vasiloff Has Not Demonstrated that his Attorney was Ineffective.

Mr. Vasiloff argues that Mr. Tuten was ineffective in negotiating the plea agreement, so that the appeal waiver in the agreement is invalid or unenforceable. Specifically, Mr. Vasiloff contends that Mr. Tuten was ineffective because Mr. Vasiloff gave up his right to appeal, but he received nothing in return. Mr. Vasiloff reasons “that a defendant can NEVER knowingly and intelligently waive their appeal rights concerning an unknown, unimposed [sic] sentence.”⁶ (Doc. 5, p. 8). Mr. Vasiloff believes that Mr. Tuten knew when he negotiated the

⁶ Mr. Vasiloff cites *United States v. Raynor*, 989 F. Supp. 43 (D. D.C. 1997), for the proposition that “a defendant cannot knowingly, intelligently and voluntarily give up the right to appeal a sentence that has not yet been imposed and about which the defendant has no knowledge as to what will occur at the time of sentencing.” *Id.* at 49.

plea agreement that Mr. Vasiloff was facing a mandatory life sentence. (Doc. 5, p. 9).

Further, Mr. Vasiloff alleges that Mr. Tuten fraudulently induced him to enter the plea agreement by telling him how to answer the questions at the plea colloquy and informed him that he would receive a “‘reasonable sentence’ if I just ‘went along with the procedure.’” (Doc. 5, p. 11). Mr. Vasiloff asserts that he was “‘induced’ to sign the plea agreement based on an understanding that my sentence was anticipated to be less than ‘LIFE.’” (*Id.* at 13). Mr. Vasiloff argues that “I was led to believe that I would receive something more (by signing the plea agreement) than if I had plead without an agreement and absent any true benefit, I was fraudulently induced to enter into the deal - - regardless of what was said at the ‘change of plea’ hearing.” (*Id.*)

Contrary to the assertions in his habeas petition, Mr. Vasiloff expressly acknowledged in his plea agreement that he did not receive promises that pressured him to plead guilty. (Crim. Doc. 15, p. 8). The plea agreement states:

“NO OTHER PROMISES OR REPRESENTATIONS HAVE BEEN MADE TO ME BY THE PROSECUTOR, OR BY ANYONE ELSE, NOR HAVE ANY THREATS BEEN MADE OR FORCE USED TO INDUCE ME TO

PLEAD GUILTY.” (*Id.*) (emphasis in original).

Statements that Mr. Vasiloff made under oath and subject to the penalty of perjury at his plea hearing similarly contradict his current contention that he was induced to enter the plea agreement. Statements made during the plea colloquy are presumed to be true. *United States v. Medlock*, 12 F.3d 185, 187 (11th Cir. 1994) (“There is a strong presumption that the statements made during the [plea] colloquy are true.”). Consequently, Mr. Vasiloff bears a heavy burden to show that his statements under oath were false. *United States v. King*, 450 Fed. Appx. 794, 800 (11th Cir. 2011); *United States v. Rogers*, 848 F. 2d 166, 168 (11th Cir. 1988). In this case, Mr. Vasiloff confirmed to the Court that his decision to enter the plea agreement was informed and voluntary, and he specifically acknowledged the effect of the appeal waiver.

THE COURT: Mr. Vasiloff, does the written plea agreement that is on the table in front of you contain everything that you are relying on at this time by way of a plea bargain or plea agreement?

THE DEFENDANT: Yes, ma’am.

THE COURT: Before you signed the agreement, did you have a sufficient opportunity to review it with your attorney, Mr. Tuten?

THE DEFENDANT: Yes, ma’am.

THE COURT: Did you have any questions of Mr. Tuten regarding the meaning of the agreement or how it might operate that he did not answer to your satisfaction?

THE DEFENDANT: No, ma'am, he answered all of my questions.

THE COURT: Mr. Vasiloff, the plea agreement that you have entered contains language waiving some or all of your rights to plea agreement the sentence to be imposed. Under certain circumstances, the defendant can waive his or her right to appeal, and that type of waiver may be enforceable. However, if you believe that the waiver that is in your plea agreement is not enforceable, you can appeal the sentence and present that theory to the appellate court. When you signed the plea agreement, did you understand that you were giving up some or all of your rights to appeal?

THE DEFENDANT: Yes, ma'am.

(Crim. Doc. 27, 9:5-10:4). Mr. Vasiloff's sworn statements that he read the plea documents, he had enough time to discuss the case with his counsel, and he was satisfied with the way his trial counsel handled his case undermine his allegation of deficient performance. *King*, 450 Fed. Appx. at 800-01 (affirming district court's decision to deny motion to withdraw guilty plea where district court did not abuse its discretion in finding that sworn statements that defendant made at plea hearing were true, and where statements from plea hearing contradicted the

arguments that defendant made on appeal).

Mr. Vasiloff specifically complains that Mr. Tuten did not provide accurate advice about the length of his sentence. This argument does not support a claim of deficient performance. “[T]rial counsel’s failure to accurately predict the sentence which the trial court will impose is not deficient performance. As the Eleventh Circuit has reiterated, effective assistance of counsel does not mean errorless assistance.” *Martin v. McDonough*, 2006 WL 2245406, *7 (M.D. Fla. Aug. 4, 2006) (citing *Green v. Zant*, 738 F.2d 1529, 1536 (11th Cir. 1984)); *Kemp v. Leggett*, 635 F.2d 453 (5th Cir. 1981).

As a practical matter, at the plea stage, Mr. Tuten could do nothing more than predict the length of Mr. Vasiloff’s potential sentence. Mr. Vasiloff’s change of plea hearing took place on October 18, 2007; he entered his plea agreement the same day. (Crim. Doc. 15; Crim. Doc. October 18, 2007 minute entry). Mr. Vasiloff’s sentencing hearing took place three months later on January 16, 2008. (Crim. Doc. 28). The United States Probation Office issued its presentence report reflecting the advisory guideline imprisonment term of life after the change of plea hearing. (Crim. Doc. 28, pp. 3-4). In advising Mr. Vasiloff about the risks and benefits of the plea waiver in Mr. Vasiloff’s plea agreement, Mr. Tuten could only

offer Mr. Vasiloff an educated guess about the sentence that the Court would impose.

Mr. Vasiloff knew this much before the Court accepted his guilty plea: the maximum sentence for *each* of the twenty-one counts relating to the photographs that Mr. Vasiloff produced was 30 years. (Crim. Doc. 27, p. 11). Mr. Vasiloff testified that he understood the applicable maximum penalty, and he understood that the sentencing guidelines were advisory and that the Court could depart from them. (Crim. Doc. 27, p. 13). With this information at his disposal, the Court asked Mr. Vasiloff if he still wished to change his plea to guilty. He replied, “Yes, your honor.” (Crim. Doc. 27, p. 26). Mr. Vasiloff then pled guilty separately to each of the 22 counts that his plea agreement covers. (Crim. Doc. 27, pp. 26-29). Mr. Tuten could not have offered Mr. Vasiloff more specific information about his potential sentence before Mr. Vasiloff changed his plea to guilty. Mr. Vasiloff has not established that Mr. Tuten’s advice was deficient.

B. Mr. Vaslioff Has Not Demonstrated That He Has Been Prejudiced by His Attorney’s Alleged Deficient Performance.

Even if Mr. Vasiloff could establish that Mr. Tuten did not adequately explain the length of Mr. Vasiloff’s potential sentence, Mr. Vasiloff cannot prevail on his petition because he cannot prove that he was prejudiced, given that

information concerning the length of his potential sentence was available to him from a variety of sources. The plea documents and the Court's instruction at the plea hearing disclosed to Mr. Vasiloff that the Court might impose the maximum penalty and that his sentence might be lengthy.

For example, the plea agreement states that the statutory punishment that the Court may impose for production of child pornography is "Imprisonment for not less than 15 years nor more than 30 years." (Crim. Doc. 15, p. 2). The Court explained that it had authority to deviate from the Sentencing Guidelines and impose a sentence that was more severe than the sentence recommended in the guidelines. (Crim. Doc. 27, p. 9:4-18). The Court also thoroughly described the penalties associated with the offenses for which Mr. Vasiloff was charged. (*Id.* at 11). In doing so, the Court explicitly stated that the available penalties for "Counts 1 through 21" applied to *each* count:

Do you understand that the maximum penalties as to Counts 1 through 21: A fine of not more than \$250,000. And this applies to each count, so there's 21 counts. So that's 21 times \$250,000. Custody of not less than 15 years and not more than 30 years; again that is each count.

(Crim. Doc. 27, p. 11). The Court also noted that as to Count 22, "the custodial term is not more than ten years." (Crim. Doc. 27, p. 12). Mr. Vasiloff stated that he understood the maximum penalties. (*Id.* at 13:2-4).

Because he cannot demonstrate that he suffered prejudice as a result of his trial counsel's alleged ineffective explanation of the potential length of his sentence, Mr. Vasiloff's ineffective assistance of counsel argument fails.

II. MR. VASILOFF'S CHALLENGES TO HIS SENTENCE ARE WITHOUT MERIT.

The waiver provision in Mr. Vasiloff's plea agreement precludes Mr. Vasiloff's collateral attack on his sentence. So does his failure to object at the sentencing hearing to the enhancements that the Court. Absent waiver, Mr. Vasiloff's argument regarding the calculation of his sentence fails on the merits. That argument has three components. First, he contends that the Court improperly enhanced his sentence by grouping various pornographic photographs together because there is no evidence that he took the photos over the span of a few days. Second, he asserts that the Court should not have applied the "pattern of activity" enhancement and that the Court's use of both the grouping and the pattern enhancements constitutes double counting. Finally, he avers that the Court should not have added the vulnerable victim enhancement to his offense level because the victim was not unusually vulnerable. (Docs. 1, 34). These arguments are not persuasive. Neither is Mr. Vasiloff's contention that his 3,900 month sentence is unconstitutional.

A. Mr. Vasiloff Waived his Ability to Attack his Sentence.

The waiver provision in Mr. Vasiloff's plea agreement defeats his attempt to challenge his sentence. The pertinent language in the waiver provision states:

I, GARY STEVEN VASILOFF, hereby waive . . . the right to challenge any sentence so imposed or the manner in which the sentence was determined in any collateral attack, including, but not limited to, a motion brought under 28 U.S.C. § 2255, subject to the following limitations:

The defendant reserves the right to contest in an appeal or post-conviction proceeding:

(a) Any sentence imposed in excess of the applicable statutory maximum sentence(s) . . .

I, GARY STEVEN VASILOFF, hereby place my signature on the line directly below to signify that I fully understand the foregoing paragraphs, and that I am knowingly and voluntarily entering into this waiver.

(Crim. Doc. 15, pp. 5-6) (emphasis in original)(signature on original).

Although he argues that his sentence is too long because of the enhancements that the Court applied and because of the way in which the Court stacked the sentences for the twenty-one counts to which he pled guilty, Mr. Vasiloff does not contend that the 15 year sentence for each of the twenty-one production counts exceeds the applicable statutory maximum sentence. Similarly, he does not suggest that the sentence that the Court imposed for the possession

count exceeds the statutory maximum. Therefore, Mr. Vasiloff's challenges to the length of his sentence do not fall within the scope of the narrow exception to the waiver provision to which he agreed. That provision bars his § 2255 attack on his sentence.

Indeed, the Court previously advised Mr. Vasiloff that if his plea agreement was valid, then he waived his collateral attack on his sentence. In recommending that the Court deny the Government's motion to dismiss the § 2255 motion, the presiding magistrate judge stated that the waiver provision governed Mr.

Vasiloff's "right to challenge in any collateral attack the sentence imposed, the manner in which the sentence was imposed, and any fines or special assessments . . . Any sentencing issues may ultimately be precluded based upon the waiver . . ."

(Doc. 19, p. 3). The District Court adopted the magistrate judge's recommendation. (Doc. 22).

Even without the waiver provision, Mr. Vasiloff waived his ability to challenge the enhancements that the Court used in the calculation of the sentence because he did not object to the enhancements at his sentencing hearing. During the sentencing hearing, Mr. Vasiloff's attorney objected to the stacking of the sentences for Counts 1 through 21, but he did not object to the grouping or pattern

of activity enhancements that the Court, based on the presentence report, used in its calculation of Mr. Vasiloff's sentence. Mr. Vasiloff did not raise these arguments in his direct appeal to the Eleventh Circuit Court of Appeals. (Case No. 08-10412-EE). Consequently, Mr. Vasiloff's arguments regarding the sentencing enhancements are barred procedurally. *See Rogozinski v. United States*, 2013 WL 1668202 (11th Cir. April 17, 2013).⁷

A. The Sentence Enhancements are Proper.

1. Grouping, Pattern of Activity, and Double Counting.

In sentencing Mr. Vasiloff, the Court accepted the recommendation in the presentence report for a four point enhancement for grouping and a five point enhancement for "pattern of activity." With respect to grouping, Mr. Vasiloff contends that the Court should have grouped all 21 of the production counts against him together because the Government did not prove by a preponderance of the evidence "that there was more than a single production day." (Doc. 5, p. 19;

⁷ Mr. Vasiloff asserts that his counsel was ineffective at the sentencing hearing and on direct appeal for failing to raise the enhancement issues. (Doc. 5, p. 18). Even if Mr. Tuten challenged the enhancements, the Court "cannot conclude that there is a reasonable probability that the result of the sentencing would have been different." *Wilson v. United States*, 962 F. 2d 996, 998 (11th Cir. 1992) (quoting *United States v. Lawson*, 947 F. 2d 849, 853 (7th Cir. 1991)). Because he cannot demonstrate prejudice, Mr. Vasiloff cannot prevail on an ineffective assistance of counsel argument concerning the enhancements that the Court used in his sentence calculation.

see also Doc. 34, pp. 12-14). He states: “[t]he government has never presented (or even had) ANY evidence of the ‘multiple production dates’ which were used to enhance his sentence from a severe one of 15-20 years to a completely outrageous term of three hundred twenty five (325) years.” (Doc. 35, p. 1).

Contrary to this argument, in his plea agreement, Mr. Vasiloff stipulated that he took the images at issue “between the dates of June 23, 2006, and August 14, 2006.” (Crim. Doc. 15, p. 4).⁸ To prepare the presentence report, the Probation Office reviewed the images. It found that Mr. Vasiloff took nine of the images at issue on June 23, 2006; three of the images on July 1, 2006; one image on July 3, 2006; one image on July 9, 2006; and seven images on August 14, 2006. (Doc. 25, pp. 7-8) (citing Presentence Investigation Report, p. 6).⁹

United States Sentencing Guidelines Section 3D1.2(b) states:

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the

⁸ Similarly, at the plea hearing the Government stated that if the case had gone to trial, the evidence would have demonstrated that the images were taken “between the dates of June 23, 2006 and August 14, 2006.” (Crim. Doc. 27, p. 25). Mr. Vasiloff acknowledged that the facts that the Government outlined were substantially correct, and he affirmed that he did the things that the Government described in its outline of the evidence that it was prepared to present at trial. (Crim. Doc. 27, pp. 25-26).

⁹ Mr. Vasiloff did not object to the presentence report. “It is the law of this circuit that a failure to object to allegations of fact in a PSI admits those facts for sentencing purposes.” *United States v. Wade*, 458 F.3d 1273, 1277 (11th Cir. 2006). Mr. Vasiloff did not object to the allegations of fact in the PSI or at the sentencing hearing. The Court deems those facts admitted.

meaning of this rule . . . [w]hen counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

U.S.S.G. §3D1.2(b). Application note 4 provides that a district court should not group counts that cannot be considered “one composite harm.” U.S.S.G. §3D1.2 n.4. The application note gives this example: “(5) The defendant is convicted of two counts of rape for raping the same person on different days. The counts are not to be grouped together.” *Id.* (emphasis in original). Following these guidelines, the Court did not err when it did not group all 21 production counts together but instead grouped only the counts that related to images taken on the same date.

With respect to “pattern of activity,” Mr. Vasiloff argues that if “there is indeed only a single provable ‘shooting day’ then there are no grounds for the § 4B1.5(b)(1) ‘pattern of conduct’ enhancement because there was but one ‘occasion,’ not ‘two or more separate instances.’” (Doc. 5, p. 21). This argument fails because the record establishes that there was more than one “shooting day.” Moreover, the commentary to guideline § 2G2.2 defines a pattern of activity as “any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation

(A) occurred during the course of the offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct.” U.S.S.G. 2G2.2 cmt n. 1; *Carter*, 292 Fed. Appx. at 19. Mr. Vasiloff had more than twenty photographs depicting his stepdaughter in sexually explicit ways. Mr. Vasiloff took the photos on different days. The record establishes that Mr. Vasiloff, “engaged in ‘two or more separate instances’ comprising a pattern of activity.” *Carter*, 292 Fed. Appx. at 19.

Finally, Mr. Vasiloff submits that the Court’s use of both the §3D1.2(b) grouping enhancement and the § 2G2.2 pattern of activity enhancement led to impermissible “double counting.” (Doc. 5, pp. 21-22). The Eleventh Circuit Court of Appeals addressed the issue of double counting relative to Chapter 2 and Chapter 4 enhancements in *United States v. Carter*, stating:

“Impermissible double counting occurs only when one part of the Guidelines is applied to increase a defendant’s punishment on account of a kind of harm that has already been fully accounted for by application of another part of the Guidelines.” *United States v. Matos-Rodriguez*, 188 F.3d 1300, 1309 (11th Cir. 1999)). Double counting is permitted, however, “if the Sentencing Commission intended that result and each guideline section in question concerns conceptually separate notions relating to sentencing.” *United States v. Stevenson*, 68 F.3d 1292, 1294 (11th Cir.1995).

Carter, 292 Fed. Appx. at 19. Significantly, the Court of Appeals reiterated, “[t]his court presumes the Sentencing Commission intended to apply separate

guideline sections cumulatively, *unless* specifically directed otherwise.” *Carter*, 292 Fed. Appx. at 19 (quoting *Matos-Rodriguez*, 188 F. 3d at 1310) (emphasis supplied).

Mr. Vasiloff has not rebutted the presumption that the Sentencing Commission intended to apply the §3D1.2(b) grouping enhancement and the § 2G2.2 pattern of activity enhancement cumulatively. Ultimately, he argues simply that it was error for the Court to apply both enhancements absent proof to support each one. (Doc. 34, p. 14). As the undersigned has explained, the record supports the enhancements. Therefore, the undersigned recommends that, if the Court reaches the merits of Mr. Vasiloff’s challenges to the calculation of his sentence, the Court reject Mr. Vasiloff’s arguments regarding the grouping and pattern of activity enhancements.

2. Vulnerable Victim.

Pursuant to §3A1.1(b)(1), the Court increased Mr. Vasiloff’s offense level by two points based on the vulnerable victim enhancement. (Doc. 19). “For purposes of subsection (b) ‘vulnerable victim’ is person (A) who is a victim of the offense of conviction ...; and (B) who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal

conduct.” U.S.S.G. §3A1.1 cmt. n. 2. “The applicability of the ‘vulnerable victim’ enhancement must be determined on a case-by-case basis, and is appropriate where the defendant knows that the victim has ‘unique characteristics’ that make the victim more vulnerable to the crime than other potential victims of the crime.” *United States v. Phillips*, 287 F.3d 1053, 1056-57 (11th Cir. 2002).

Mr. Vasiloff argues emphatically that the victim in this case, “was NOT UNUSUALLY vulnerable.” (Doc. 34, p. 16). The undersigned disagrees. The victim in this case is Mr. Vasiloff’s stepdaughter. She was 14 years old when he took the images at issue. Mr. Vasiloff created the images while his wife – his stepdaughter’s mother – was hospitalized, and he was caring for the victim and for her brother. Mr. Vasiloff’s relationship with the victim and the nature of the crime warrant the vulnerable victim enhancement.¹⁰

B. Mr. Vasiloff’s Sentence is not Unconstitutional.

Mr. Vasiloff presents three arguments in support of his contention that his 3,900 month sentence is unconstitutional. First, in what appears to constitute a

¹⁰ Mr. Vasiloff argues at length that the Court should not have applied this sentence enhancement as a matter of law because it does not concern the provision of alcohol or drugs to a minor, (Doc. 34, pp. 14-18), and he contends that it is “a standard practice in the film and photo business to use ‘fake’ beer inside a ‘real’ beer bottle,” (Doc. 30, p. 3). The undersigned does not reach these issues because the undersigned finds that vulnerable victim enhancement rests squarely on Mr. Vasiloff’s familial relationship to the victim and on her susceptibility to abuse, given the circumstances of her mother’s illness.

due process challenge, Mr. Vasiloff posits that he cannot be charged with possession of child pornography because he deleted the images at issue before he was arrested. (Doc. 34, pp. 18-20). Second, he submits that the 3,900 month sentence constitutes cruel and unusual punishment. (Doc. 5, pp. 29-32). Finally, Mr. Vasiloff contends that the Guidelines Manual offense level 43 should be a sentence range, not a mandatory life sentence -- another apparent due process argument. (Doc. 5, pp. 32-33). The undersigned recommends that the Court reject these constitutional challenges.

1. Mr. Vasiloff “Possessed” Child Pornography.

Mr. Vasiloff argues that, “[i]n a holistic sense, one does not ‘possess’ something that they long ago put in the trash.” (Doc. 34, p. 19). 18 U.S.C. § 2252A(a)(5)(B) defines possession of child pornography as:

knowingly possess[ing], or knowingly access[ing] with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer.

According to the Eleventh Circuit Court of Appeals, possession is “the act or

condition of having in or taking into one's control or holding at one's disposal.”

United States v. Woods, 684 F.3d 1045, 1059 (11th Cir. 2012) (quoting *United States v. Frank*, 599 F.3d 1221, 1234 (11th Cir. 2010)). When a defendant deletes images of child pornography, he continues to “exercise control over the images.” *United States v. Shiver*, 305 Fed. Appx. 640, 643 (11th Cir. 2008) (citing *United States v. Romm*, 455 F.3d 990, 1000 (9th Cir. 2006)).

Like Mr. Vasiloff, Mr. Shiver argued that he did not possess child pronography because he deleted the offending images from his computer. The Eleventh Circuit was not persuaded. The appellate court opined:

Shiver insists that since all of the images had been deleted and stored in his computer's unallocated files, and since he lacked the ‘forensic software’ to access or retrieve the images from that location, he consequently lacked the ability to exercise dominion or control over the images. But even assuming that Shiver was in fact unable to retrieve the images from the unallocated files, he was able to exercise control over the images by deleting them from his computer's cache.

Shiver, 305 Fed. Appx. at 643. The court equated control with possession and held that Mr. Shiver “possessed the images knowingly.” *Id.* Mr. Vasiloff's argument is indistinguishable from Mr. Shiver's and equally unpersuasive. Thus, under this binding precedent, Mr. Vasiloff possessed photographs for

purposes of §2252A(a)(5)(b) even if he deleted them.¹¹

In any event, Mr. Vasiloff's argument cannot be reconciled with the record. At his plea hearing, Mr. Vasiloff admitted that he possessed child pornography. (Crim. Doc. 27, p. 25:10). Mr. Vasiloff possessed the pictures prior to deleting them. In his plea agreement, he stipulated that he took "nude photographs of his stepdaughter (age 14) using a dildo and posing in other lewd and lascivious positions, and had downloaded the photos from his digital camera onto his personal computer." (Crim. Doc. 15, p. 3). Therefore, he exercised control over the photographs. Mr. Vasiloff was properly sentenced for possession of child pornography.

2. Mr. Vasiloff's Sentence Does Not Constitute Cruel and Unusual Punishment.

¹¹ Mr. Vasiloff cites *United States v. Seiver*, 692 F.3d 774 (7th Cir. 2012), for the proposition that, "it is true that after deleting a file and emptying the trash bin containing it, a computer owner who is not technologically sophisticated no longer 'possesses' the file in a meaningful sense, and the crime of which the defendant was committed requires knowing possession. Had the defendant deleted the incriminating files (and emptied his trash folder with those files in it), he would no longer have knowingly possessed them if . . . he could no longer access them because he lacked the software that he would have needed to be able to recover them from the hard drive's slack space." *Id.* at 778 (citing *United States v. Moreland*, 665 F.3d 137, 152 (5th Cir. 2011)). The language that Mr. Vasiloff cites is dicta in an opinion regarding the validity of a search warrant for a computer that contained evidence of violations of 18 U.S.C. §§ 2252 and 2252A. Moreover, an opinion from the Seventh Circuit Court of Appeals is persuasive authority; it does not trump binding Eleventh Circuit authority.

Citing the Eighth Amendment, Mr. Vasiloff argues that his sentence constitutes cruel and unusual punishment. (Doc. 5, p. 29). “The Eighth Amendment provides: ‘Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.’ U.S. Const. Amend. VIII. ‘The Eighth Amendment does not require strict proportionality between crime and sentence’ but rather ‘forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.’” *United States v. Estrella*, 2013 WL 1943433, *4 (11th Cir. May 13, 2013) (quoting *United States v. Farley*, 607 F.3d 1294, 1341 (11th Cir. 2010)). “‘Outside the context of capital punishment, *successful* challenges to the proportionality of sentences [are] exceedingly rare.’” *United States v. Raad*, 406 F.3d 1322, 1323 (11th Cir. 2005)(quoting *Solem v. Helm*, 463 U.S. 277, 289 (1983))(emphasis supplied). Mr. Vasiloff bears the burden of showing that the sentence is grossly disproportionate to the offense committed. *United States v. Johnson*, 451 F.3d 1239, 1243 (11th Cir. 2006).

“Child sex crimes are among the most egregious and despicable of societal and criminal offenses . . .” *United States v. Sarras*, 575 F.3d 1191, 1220 (11th Cir. 2009). As the Court noted, this child sex crime involving Mr. Vasiloff’s 14 year old stepdaughter was, for all intents and purposes, incestuous, making it all

the more egregious. The Court explained:

The fact that Mr. Vasiloff used his position as the stepfather or surrogate father -- and by surrogate father, I mean more than stepfather. There was a close relationship where the child looked on Mr. Vasiloff as the person who had been in the role of her father makes this worst. Although any child should not go through what this child went through, but the fact that Mr. Vasiloff was [for all intents and] purposes her father makes this worst. The fact that the mother was in the hospital just gave Mr. Vasiloff more access to his stepdaughter without any fear of discovery by his wife.

...

But because of the relationship between Mr. Vasiloff and this particular child, it's not only, you know, the production of child pornography or sexual exploitation of a child, but it's sexual exploitation of a child who in everything but a biological sense was the daughter of the perpetrator, and so it's incestuous type. Well, although I guess technically incest. It's just that type of violation. And the level of -- I mean, I am not a psychologist or psychiatrist, but the level of the impact on the victim, in my experience with these cases coming before me, is exacerbated when there is an incestuous type exploitation.

(Crim. Doc. 28, pp. 16-17).

As the Court stated, Mr. Vasiloff's 325 year sentence "is basically just another way of saying life." (Crim. Doc. 28, p. 16:7-10). The sentence is severe, but it is not disproportionate under the circumstances, and it does not violate the Eighth Amendment. *See United States v. Rolon*, 445 F.3d 314, 332 (11th Cir. 2011) (rejecting Eighth Amendment challenge to consecutive life sentences);

Sarras, 575 F.3d at 1209 (affirming sentence of “360 months on each of counts one, two, and three [concerning persuading a minor to engage in sexually explicit conduct]; and [a] term of 120 months on count four [possession of child pornography]. All such terms to run consecutive.”); *Carter*, 292 Fed. Appx. at 18, 20-21 (affirming consecutive 20 year (count 1 - production), 15 year (count 2 - distribution/receipt), and 10 year (count 3 - possession of child pornography) sentences even though defendant argued that he was in poor health); *see generally*, *United States v. Hankerson*, 491 Fed. Appx. 166, 168 (11th Cir. 2012) (quoting with approval *United States v. Yousef*, 327 F.3d 56, 163 (2nd Cir. 2003)) (“Lengthy prison sentences, even those that exceed any conceivable life expectancy of a convicted defendant, do not violate the Eighth Amendment’s prohibition against cruel and unusual punishment when based on a proper application of the Sentencing Guidelines or statutorily mandated consecutive terms.”).¹²

¹² Mr. Vasiloff has asked the Court to take notice of Judge Posner’s concurring opinion in *United States v. Craig*, 703 F.3d 1001, 1002-04 (7th Cir. 2012) (Posner, J., concurring). Judge Posner’s cost-benefit analysis of lengthy sentences is interesting and worthy of discussion, but it does not cast a constitutional pall over the sentence in this case. The *per curiam* opinion in *Craig* supports the sentence in this case. Mr. Craig’s total offense level for four counts of producing child pornography was 43 (just like Mr. Vasiloff’s offense level), and “his guideline sentence for each count was life.” Instead of giving him a life sentence, the district court sentenced Mr. Craig to 30 years on one count and to concurrent twenty year sentences on the other three counts, with instructions that Mr. Craig was to serve the concurrent 20 year sentences

3. **Mandatory Life of PSI Offense Levels Greater than 43.**

Mr. Vasiloff argues that there should be a sentence range for offenses above 43. (Doc. 5, p. 32). 28 U.S.C. § 994(a) authorizes the United States Sentencing Commission to promulgate guidelines and policy statements. The Commission's statutory mission is to "foresee guidelines that will further the basic purpose of criminal punishment...it delegates to the Commission broad authority to review and rationalize the federal sentencing process." U.S.S.G. §1A1.1, ¶ 2. The Commission is responsible for adopting sentencing ranges.

Mr. Vasiloff cites *United States v. Heath*, 840 F. Supp. 129, 131 (S.D. Fla. 1993), for the proposition that an offense level above 43 should have a sentence range. *Heath* is not a child pornography case; it is a drug case involving a young defendant. *Id.* Although the district court judge formulated a sentence range for levels above 43, he did so because the sentence table "does not consider the impact caused to a young defendant." *Id.* Mr. Vasiloff committed his crime as an older offender, and the crime was more egregious in nature than Mr. Heath's crack cocaine offense at the age of 22. The undersigned does not recommend that the Court follow *Heath*, an opinion that is not binding in this Court. There is no flaw,

consecutive to the 30 year sentence. The Seventh Circuit panel held that, "[t]he judge was entitled to do this," and the panel dismissed the appeal. *Id.* at 1002.

constitutional or otherwise, in the Court's use of existing sentencing guidelines.¹³

C. Cumulative Error Theory.

The undersigned does not find that there were multiple errors committed during Mr. Vasiloff's criminal proceedings. Mr. Vasiloff contends that he has been denied the constitutional right to a fair trial; however, he waived his right to a trial when he accepted a plea agreement.

III. MR. VASILOFF IS NOT ENTITLED TO AN EVIDENTIARY HEARING.

Mr. Vasiloff has asked for an evidentiary hearing so that he may present "evidence from outside the record" in support of his § 2255 motion. (Doc. 30, p.1). "[I]f the petitioner 'alleges facts that, if true, would entitle him to relief, then the district court should order an evidentiary hearing and rule on the merits of his claim.'" *United States v. Scott*, 325 Fed. Appx. 822, 824 (11th Cir. 2009) (quoting *United States v. Aron*, 291 F.3d 708, 715(11th Cir. 2002)). "[A] district court is not required to hold an evidentiary hearing where the petitioner's

¹³ Mr. Vasiloff also complains in general about sentencing procedures. He contends that it is wrong for a court to have to advise a defendant only of the maximum potential penalty for the crimes with which he is charged and not to have to tell the defendant that the sentences for separate counts may run consecutively. (Doc. 15, pp. 21-23). Here, the Court explicitly told Mr. Vasiloff at his plea hearing that the maximum penalty that the Court described applied to each count, and the Court made clear that Mr. Vasiloff's guilty plea pertained to 21 production counts and one possession count. (Doc. 27, p. 11). Mr. Vasiloff has not demonstrated that his sentence is unconstitutional on this record.

allegations are affirmatively contradicted by the record, or the claims are patently frivolous.” *Id.* The evidence which Mr. Vasiloff proposes to introduce at an evidentiary hearing either supports arguments that are patently frivolous or concerns allegations that the record affirmatively contradicts.

Mr. Vasiloff first wishes to offer evidence to contest Mr. Tuten’s assertion in his affidavit that Mr. Vasiloff benefitted from his guilty plea because the Government agreed to forego additional investigation of Mr. Vasiloff’s conduct in exchange for the plea, and the investigation may have produced evidence that would support additional charges against Mr. Vasiloff. (Doc. 25-1, p. 1; Doc. 30, pp. 2-3). In his affidavit, Mr. Tuten stated that Mr. Vasiloff, “informed me of information that caused us to believe that other related charges would be filed against him if this information ever came to light through his admission or through a more thorough investigation. I shall not divulge that information as it is covered by the attorney client privilege. Mr. Vasiloff did not want a trial as trial preparation could result in the Government discovering the additional information about the case. Further, Mr. Vasiloff could not testify at a trial without the probability of his testimony revealing to the Government information that could and probably would lead to more charges.” (Doc. 25-1, p. 1). Mr. Vasiloff argues

that, “[c]ontrary to Mr. Tuten [sic] claims, Mr. Vasiloff did NOT admit to any additional significant crimes, and even if he had, they wouldn’t have subjected him to more time in prison than he will end up serving on his current 3,900 month ‘bargain’ that Mr. Tuten claims to have arranged.” (Doc. 30, p. 2).

The record contradicts Mr. Vasiloff’s assertion. The affidavit that an FBI Special Agent provided in support of the federal criminal complaint against Mr. Vasiloff contains descriptions of conduct that exceeds the scope of the conduct addressed in Mr. Vasiloff’s federal indictment, lending credence to Mr. Tuten’s assertion that Mr. Vasiloff gained a benefit by obtaining “reasonable assurances from the Government that the investigation was closed and that there were no other possible charges that would be filed in the Northern District of Alabama.” (Doc. 25-1, p. 1; Crim. Doc. 1, p. 2). Specifically, the agent stated in his affidavit that the Alabama Department of Human Resources Assessment of Children at Risk officials reported to the Cherokee County Sheriff’s Office that, “Gary Steven Vasiloff had sexually abused his stepdaughter (age 14) by performing oral sex on her, watching ‘sex movies’ with her, persuading her to rub his penis, and teaching her to use a dildo.” (Crim. Doc. 1, p. 2). This conduct could have served as the basis for additional charges against Mr. Vasiloff. Perhaps there is other conduct of

which Mr. Tuten is aware. On this record, the undersigned does not find that an evidentiary hearing is warranted.¹⁴

In support of his argument that the Court should not have applied a vulnerable victim enhancement in calculating his sentence, Mr. Vasiloff seeks to introduce evidence that it is “standard practice in the film and photo business to use ‘fake’ beer inside a ‘real’ beer bottle.” (Doc. 30, p. 3). He offers the declaration of Robert Tashbook who posits that, “it is the nearly universal practice to use ‘fake’ (non-alcoholic) liquid instead of real (or simulated) beer bottles when filming or photographing a scene involving the depiction of a performer ‘drinking’ from a bottle.” (Doc. 30, p. 11). This statement and Mr. Tashbook’s “professional judgment,” based on his review of the Government’s description of the images at issue, that Mr. Vasiloff’s stepdaughter was neither drunk nor medicated when Mr. Vasiloff photographed her is probative of nothing, is patently frivolous, and does not entitle Mr. Vasiloff to relief. *See* pp. 34-35, *supra*.

Therefore, the undersigned recommends that the Court deny Mr. Vasiloff’s

¹⁴ Mr. Vasiloff asks the Court to sanction Mr. Tuten for “false statements that he made in his affidavit.” (Doc. 31, p. 1). Mr. Vasiloff offered his declaration and his sister’s declaration in support of his request for a sanction. (*Id.* at p. 3-8). Mr. Vasiloff’s sister, Ms. Medley, states, for example, that she is “unaware of any actions (of commission or omission) by the defendant that WOULD have opened him up to criminal liability, contrary to the sworn claims of Mr. Tuten in his affidavit.” (Doc. 31, p. 8). For the reasons stated above, Mr. Vasiloff’s criticisms of Mr. Tuten’s affidavit are unpersuasive. There is no basis for a sanction.

motion for an evidentiary hearing.

CONCLUSION

The undersigned magistrate judge RECOMMENDS that the Court DENY Mr. Vasiloff's motion to vacate, set aside or correct sentence.

Notice of Right to Object

Any party who objects to this report and recommendation must, within fourteen (14) days of the date on which it is entered, file specific written objections with the clerk of this court. Any objections to the failure of the magistrate judge to address any contention raised in the petition also must be included. Failure to do so will bar any later challenge or review of the factual findings or legal conclusions of the magistrate judge. See 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985), *reh'g denied*, 474 U.S. 1111, 106 S.Ct. 899, 88 L.Ed.2d 933 (1986); *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982) (en banc). In order to challenge the findings of the magistrate judge, a party must file with the clerk of the court written objections which shall specifically identify the portions of the proposed findings and recommendation to which objection is made and the specific basis for objection. A copy of the objections must be served upon all other parties to the

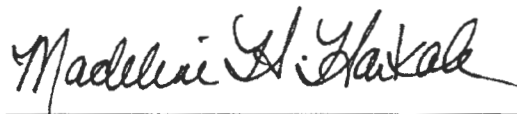
action.

Upon receipt of objections meeting the specificity requirement set out above, a United States District Judge shall make a de novo determination of those portions of the report, proposed findings, or recommendation to which objection is made and may accept, reject, or modify in whole or in part, the findings or recommendations made by the magistrate judge. The district judge, however, need conduct a hearing only in his discretion or if required by law, and may consider the record developed before the magistrate judge, making his own determination on the basis of that record. The district judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Objections not meeting the specificity requirement set out above will not be considered by a district judge.

A party may not appeal a magistrate judge's recommendation directly to the United States Court of Appeals for the Eleventh Circuit. Appeals may be made only from a final judgment entered by or at the direction of a district judge.

Done, this the 14th day of August, 2013.



MADELINE HUGHES HAIKALA
U.S. MAGISTRATE JUDGE

46

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF ALABAMA
 MIDDLE DIVISION

GARY STEVEN VASILOFF,)	
)	
Petitioner,)	
)	
v.)	Case No. 4:10-cv-08001-VEH-PWG
)	(Crim. No. 4:07-cr-00337-VEH-PWG)
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

MEMORANDUM OPINION AND ORDER

The previously assigned magistrate judge filed a report and recommendation on August 14, 2013 (Doc. # 37), recommending that the petition for writ of habeas corpus be DENIED. On September 16, 2013, petitioner filed a pleading styled as “Notice of Fraud Upon the Court.” (Doc. # 40). On October 7, 2013, petitioner filed “Petitioner’s Objections to Magistrate’s Report and Recommendation.” (Doc. # 42). The Court will treat such filings as motions, or, in the alternative, as objections to the magistrate judge’s report and recommendation.

Also pending are petitioner’s Motion for Evidentiary Hearing (Doc. # 30) and petitioner’s Motion to Appoint Counsel (Doc. # 32); in light of the remainder of this opinion, these motions are hereby DENIED as MOOT. Next, while not styled as a motion, the court construes petitioner’s “Request to Delay Ruling and Add One Exhibit” (Doc. # 44) as such; this motion is hereby GRANTED IN PART and DENIED IN PART. Specifically, petitioner’s request to add an exhibit is hereby GRANTED; the request to delay ruling is hereby DENIED. Finally, petitioner has filed a “Request for Immunity Letter” (Doc. # 41); while not styled as a motion, to the extent that it could be so construed, it is hereby

DENIED. The court has also considered the “supplemental citations” as set ut in petitioner’s Notice of Supplemental Citations” (Doc. # 45).

Having carefully reviewed and considered *de novo* all of the materials in the court file, the Court is of the opinion that the magistrate judge’s findings are due to be and are hereby ADOPTED and her recommendation is ACCEPTED. To the extent that the petitioner’s filings of September 16, 2013, and October 7, 2013 (Docs. # 40, 42), are construed as interposing objections to the report and recommendation, such objections are due to be and hereby are OVERRULED. To the extent that the petitioner filings (Docs. # 40, 42) are construed as motions, they are due to be and hereby are DENIED. Accordingly, the petition for writ of habeas corpus is due to be DENIED. A Final Judgment will be entered.

As to the foregoing it is SO ORDERED this the 4th day of December, 2013.


VIRGINIA EMERSON HOPKINS
United States District Judge

47

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

GARY STEVEN VASILOFF,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

)
)
)
)
) Case No. 4:10-cv-08001-VEH-PWG
) (Crim. No. 4:07-cr-00337-VEH-PWG)
)
)
)

FINAL JUDGMENT

In accordance with the Memorandum Opinion entered contemporaneously herewith and with Rule 58 of the *Federal Rules of Civil Procedure*, it is hereby ORDERED, ADJUDGED, and DECREED that the petition for writ of habeas corpus is DENIED.

As to the foregoing it is SO ORDERED this the 4th day of December, 2013.


VIRGINIA EMERSON HOPKINS
United States District Judge

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Mr. Gary Steven Vasiloff, pro se

USP -- 26486001

P.O. Box 24550, Tucson, AZ 85734

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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

Gary Steven VASILOFF,	}	Case No. 4:10-cv-08001-VEH-PWG
Petitioner,	}	4:07-cr-00337-VEH-PWG
vs.	}	
UNITED STATES OF AMERICA,	}	(conditional) NOTICE
Respondent.	}	OF APPEAL
_____	}	

Petitioner pro se, Mr. Gary Steven Vasiloff ["Mr. Vasiloff"], respectfully notices this Court and opposing counsel, the United States Attorney, that he wishes to appeal the final judgment of this Court, which denied his petition for a writ of habeas corpus [under 28 U.S.C. §2255] and his associated filings that were also denied (whether explicitly or "as moot") at that same time.

This Notice is timely under Fed.R.App.P. 4(a)(1)(B)(i) as it is filed within 60 days of the 4 December 2013 final judgment and it is an appeal in a civil case and the respondent in the United States.

This notice is CONDITIONAL on three things:

First, despite Mr. Vasiloff explicitly noting various factual and legal errors (not mere differences in interpretation or opinion) that were material to (former) Magistrate Haikala's Report & Recommendation, this Court did NOT explicitly address ANY of those errors when denying the Habeas petition. Since Mr. Vasiloff contends that the CORRECT facts (as presented by him) "if [found by this Court to be] true, would entitle him to relief, [this Court] should [have] order[ed] an evidentiary hearing," which was instead summarily denied. Absent an EXPLICIT addressing of these claimed factual errors, Mr. Vasiloff, contends that it is more likely that his claims were misunderstood rather than "liberally construed," as Supreme Court and Circuit precedent requires. Mr. Vasiloff is filing a SEPARATE Motion to this Court highlighting these explicit errors. In light of that filing, perhaps it is best for this Court to retain jurisdiction of this case-- as a correction or amendment of this Court's 4 December 2013 will directly affect the (need and subject of this) appeal.

Second, there is a previously filed Motion before this Court to get Mr. Vasiloff's "direct appeal" rights restored-- in light of the Eleventh Circuit's erroneous "dismissal" of the that appeal in 2008 (based on his an alleged lawful waiver of his appeal rights), a ruling that is in direct conflict with this Court's 4 December 2013 ruling, that Mr. Vasiloff did not waive those appeal rights. When this Court grants that Motion, then an appeal of this \$2255 Motion will be moot as Mr.

Vasiloff can present a stronger version of these claims to the

Court of Appeals via his restored "direct appeal."

Third, Rule 11 of the Rules Governing §2255 Proceedings states in part, "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Such was NOT done by this Court. Therefore, Mr. Vasiloff respectfully requests that he be allowed to take advantage of the second sentence of that same rule subsection: "... the court may direct the parties to submit arguments on whether a certificate should issue." Mr. Vasiloff believes that such a COA is meritorious. He requests the opportunity to argue this fact to this Court, prior to its making a decision on whether to issue a COA.

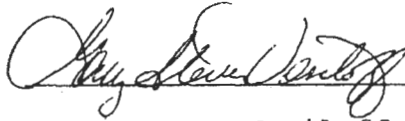
Mr. Vasiloff suggests to this Court that perhaps an extension of time to file an appeal, as per Fed.R.App.P. 4(a)(5) or any other germane statute, rule or policy, would be appropriate, to allow for resolution of the two above issues and any others that might be relevant.

Mr. Vasiloff further prays for any and all other relief, related to his timely appeal of this Court's rulings on 4 December 2013, to which he might be entitled. He further requests that, just like all of his filings, this filing be "liberally construed."

Mr. Vasiloff respectfully requests that the Court of Appeals be made aware that he will be filing a separate COA application once the appeal is docketed.

RESPECTFULLY SUBMITTED,

24 January 2014



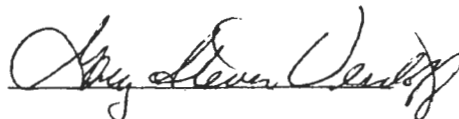
Gary Steven Vasiloff, pro se

[Because opposing counsel, the United States Attorney, is an electronic filer, they will be served by the CM/ECF system using an NDA. Mr. Vasiloff requests to be sent a simultaneous NDA, delivered by U.S. Mail, so that he can verify receipt by the Court of this Notice and that such service on the US was actually performed.]

VERIFICATION

I, Gary Steven Vasiloff, do hereby affirm under penalty of perjury, as per 28 U.S.C. §1746, that all facts in this Notice, including the date of delivery of this Notice to prison legal staff for mailing to this Court, are true and correct.

24 January 2014



Gary Steven Vasiloff, pro se

53

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION**

GARY STEVEN VASILOFF,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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Case No. 4:10-cv-08001-VEH-PWG
(Crim. No. 4:07-cr-00337-VEH-PWG)

**ORDER REGARDING CERTIFICATE OF APPEALABILITY
IN PRISONER HABEAS CASE**

The petitioner, Gary Steven Vasiloff ("Petitioner"), has filed a notice of appeal (Doc. # 49) from the Court's denial of his petition for writ of habeas corpus brought pursuant to 28 U.S.C. § 2255. The notice of appeal also includes a request for the opportunity to submit arguments regarding why the Court should issue a certificate of appealability. (Doc. # 49 at 3). The Court construes the notice of appeal as a motion for certificate of appealability.

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, a "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further,'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

For the reasons set forth in the magistrate judge's report and recommendation (Doc. # 37), which was adopted by the Court (Doc. # 46), Petitioner has not met the standard required to obtain

a certificate of appealability. Accordingly, to the extent that the notice of appeal (Doc. # 49) is construed as a motion for a certificate of appealability, it is hereby **DENIED**. The Court advises Petitioner that he may seek a certificate of appealability directly from the Court of Appeals for the Eleventh Circuit.

DONE this 6th day of February, 2014.



VIRGINIA EMERSON HOPKINS
United States District Judge

59

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-10483-A

GARY STEVEN VASILOFF,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.


Appeal from the United States District Court
for the Northern District of Alabama

ORDER:

Gary Steven Vasiloff moves for a certificate of appealability ("COA"), and leave to proceed *in forma pauperis* ("IFP"), in order to appeal the district court's denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence. To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because Vasiloff has satisfied this standard, his motion for a COA is GRANTED on the following issues only:

- (1) Whether Vasiloff's claim that the indictment was multiplicitous was barred by his guilty plea or the appeal waiver.
- (2) If not, whether the indictment was multiplicitous.

Vasiloff's motion for IFP is also GRANTED.


UNITED STATES CIRCUIT JUDGE

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

John Ley
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

December 08, 2014

Gary Steven Vasiloff
USP Tucson - Legal Mail
PO BOX 24550
TUCSON, AZ 85734

Appeal Number: 14-10483-A
Case Style: Gary Vasiloff v. USA
District Court Docket No: 4:10-cv-08001-VEH-PWG
Secondary Case Number: 4:07-cr-00337-VEH-PWG

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.

The enclosed order has been ENTERED.

Sincerely,

JOHN LEY, Clerk of Court

Reply to: Denise E. O'Guin, A
Phone #: (404) 335-6188

MOT-2 Notice of Court Action

61

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-10483-A

GARY STEVEN VASILOFF,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

Before ROSENBAUM and JILL PRYOR, Circuit Judges:

BY THE COURT:

Gary Steven Vasiloff moves for clarification of this Court's order of December 8, 2014, granting him a certificate of appealability ("COA"), and leave to proceed *in forma pauperis* on appeal. Vasiloff has also moved to stay the briefing schedule in this appeal. The motion for clarification is DENIED, in part, as to the first issue authorized in the COA, except to remind the parties that any issue not raised in an initial brief will be deemed abandoned. *See United States v. Day*, 405 F.3d 1293, 1294 n.1 (11th Cir. 2005).

The motion for clarification is GRANTED as to the second issue authorized in the COA.

The second issue authorized in the COA is amended as follows:

(2) If not, whether the indictment was multiplicitous because it charged one production count for each individual photograph.

The motion to stay the briefing schedule is DENIED AS MOOT.

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Douglas J. Mincher
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

April 13, 2015

Gary Steven Vasiloff
USP Tucson - Inmate Legal Mail
PO BOX 24550
TUCSON, AZ 85734

Appeal Number: 14-10483-AA
Case Style: Gary Vasiloff v. USA
District Court Docket No: 4:10-cv-08001-VEH-PWG
Secondary Case Number: 4:07-cr-00337-VEH-PWG

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.

The enclosed order has been ENTERED.

Sincerely,

DOUGLAS J. MINCHER, Clerk of Court

Reply to: David L. Thomas, AA/rvg
Phone #: (404) 335-6169

MOT-2 Notice of Court Action

CERTIFICATE OF SERVICE

I hereby certify that on this the 13th day of July, 2015, the foregoing appendix was filed electronically using the Court's CM/ECF system and a copy was served on the *pro-se* Appellant by first-class United States mail, postage prepaid, addressed as follows:

Gary Steven Vasiloff, *pro se*
#26486-001
U.S.P. - Tucson
P.O. Box 24550
Tucson, AZ 85734

and by mailing the original and an additional copy of the appendix by Federal Express overnight delivery, to the Clerk of this Honorable Court, on the same date, addressed as follows:

Clerk's Office – Appeal No. 14-10483-AA
U.S. Court of Appeals – Eleventh Circuit
56 Forsyth Street NW
Atlanta, GA 30303.



Michael B. Billingsley
Assistant United States Attorney

Address of Counsel:

United States Attorney's Office
1801 Fourth Avenue North
Birmingham, Alabama 35203-2101
(205) 244-2001